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RECORD, CASE NO. 14511.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 667.

THE UNITED STATES, APPELLANT,

vs.

EDWIN E. MARVIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED MARCH 5, 1891.

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1 EDWIN E. MARVIN, PLAINTIFF.
vs.
THE UNITED STATES, DEFENDANT.

To the Honorable the Supreme Court of the United States:

The appeal of the United States, the above-named defendant, respectfully shows:

That on the 6th day of April, A. D. 1889, the above-named complainant brought suit in the circuit court of the United States for the district of Connecticut, in the manner provided by the act of Congress of March 3, 1887 (24 St. at Large, 505), demanding the sum of thirteen hundred dollars for his fees for services on behalf of the United States as clerk of the U. S. circuit court and U. S. district court and U. S. circuit court commissioner, and not received by him during the six years next prior to the bringing of said suit.

That thereafter, in like manner, on the 9th day of April, 1889, the said plaintiff filed a supplemental complaint demanding one hundred and sixty-five dollars for other like services of the said defendant, for which he had received no payment.

That thereafter, on June 19th, 1890, in like manner, the said plaintiff filed a further supplemental complaint demanding the further sum of two hundred and seventy-one dollars and sixty cents for other like services performed by the said plaintiff for the said defendant since the filing of the said complaint, for which he had received no payment.

That on the 18th day of November, A. D. 1890, in like manner, the said plaintiff filed a supplemental complaint demanding one hun-
2 dred and thirty-four dollars and eighty cents for other like services of the plaintiff on behalf of the defendant, accruing since the filing of said original bill.

That the United States appeared by its attorney and denied the right of the plaintiff to recover, and the several matters in the original and supplemental complaints were heard before the court as one suit on the 26th day of November, 1890.

And on the 19th day of December, 1890, the court filed its findings of fact and conclusions of law, authorizing judgment for the plaintiff in the sum of $1,279.12, and on the same day, on motion of the plaintiff, judgment was duly entered in his favor for the said sum and costs.

Whereby this defendant is aggrieved and injured.

Wherefore the defendant appeals from the said judgment to this court and prays that said complaints and said findings of fact and conclusions of law and said judgment may be sent to the Supreme Court of the United States without delay, and that said court may hear said cause anew and overrule the said conclusions of law and reverse said judgment, and grant to this defendant and appellant such relief as to the said court may seem meet.

Hartford, Conn., February 10th, 1891.

THE UNITED STATES,
By GEORGE G. SILL,
Its Attorney.

The foregoing appeal is allowed.

N. SHIPMAN,
District Judge.

3 By the Honorable Nathaniel Shipman, one of the judges of the circuit court of the United States for the district of Connecticut.

To EDWIN E. MARVIN, *of Hartford, in the State of Connecticut:*

Whereas the United States has lately appealed to the Supreme Court of the United States from a judgment lately rendered in the circuit court of the United States for the district of Connecticut, made in favor of you, the said Edwin E. Marvin, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 11th day of March next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Hartford, in the district of Connecticut, in the second circuit, the 10th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

N. SHIPMAN,
District Judge.

HARTFORD, CONNECTICUT, *February* 10, 1891.

Due and lawful service of the foregoing writ is hereby accepted and acknowledged.

Signed

EDWIN E. MARVIN.

The return of the judges of the circuit court of the United States for the district of Connecticut to the foregoing writ of error:

The record, proceedings, and judgment whereof mention is therein made follow in these words and figures, viz:

4 EDWIN E. MARVIN
vs.
THE UNITED STATES. } No. 354. Law.

Be it remembered that on the 6th day of April, 1889, the United States, by its attorney, George G. Sill, esq., was summoned to appear before the circuit court of the United States for the district of Connecticut, to be held at New Haven, within and for said district, on the fourth Tuesday of April, A. D. 1889, then and there to answer unto Edwin E. Marvin, of Hartford, in the State and district of Connecticut, in a civil action, wherein the plaintiff complains and says:

1. That on the seventh day of July, A. D. 1874, your petitioner was appointed by the judge of the district court of the United States for said district to be the clerk of the district court of the United States for the district of Connecticut, and was, on said last-named date, duly qualified and sworn, and entered upon the duties of said office, and has ever since performed all the duties of said office, and is entitled to all the fees accruing therefor.

2. That on the twenty-fifth day of May, A. D. 1875, your petitioner was duly appointed by the judges of the circuit court of the United States for the said district to be a commissioner of the circuit court, under and in pursuance of section 627 of the Revised Statutes of the United States, and that he thereupon was duly qualified and sworn and entered upon the duties of said office, and has ever since performed the duties thereof, and is entitled to his lawful fees for all his lawful services in this regard.

5 3. That on the ninth day of June, A. D. 1877, your petitioner was duly appointed by the judges of the circuit court of the United States for the second circuit and district of Connecticut to be the clerk of the said circuit court for the district of Connecticut, and that thereupon he was duly qualified and sworn and entered upon the duties of said office, and has ever since performed the same, and is entitled to the lawful fees accruing therefor.

4. That in the said offices of clerk of the U. S. district court, commissioner of the circuit court, and clerk of the U. S. circuit court, from and after the 6th day of April, A. D. 1883, your petitioner has rendered services on behalf of the United States for which fees, by the provisions of the certain act of Congress, known as the fee bill, and the amendments thereto, have been earned by him to the amount of twelve hundred dollars and cents.

5. The items of fees so earned by him in behalf of the United States are as follows, to wit:

6 Account of E. E. Marvin, Hartford, Conn., for fees earned during the six years prior to April 6th, 1889, both as clerk and commissioner and not included in the accounts now pending in the Court of Claims in the hands of C. C. Lancaster, esq., 1313 F street, Washington, D. C.

I.

Orders to pay accounts of court officers and filing vouchers.

July 7, 1886. Duplicate orders to pay the accounts of marshals, attorneys, and clerks of courts, chargeable each as follows: Original order, 3 folios, 45c.; seal, 20c.; certificate on same that duplicate is on file, 15c.; duplicate, 3 folios, 45c.; seal, 20c.; filing do., 10c.; $1.55 in the whole.

Clerk district court:

1886.			
July 27.	23 do	35.65	
1887.			
Jan. 6.	24 do	37.20	
April 1.	9 do	13.95	
July 6.	3 do	4.65	
Oct. 1.	9 do	13.95	
1888.			
Jan. 2.	5 do	7.75	
April 7.	9 do	13.95	
July 2.	10 do	15.50	
Oct. 1.	9 do	13.95	
1889.			
Jan. 1.	3 do	4.65	
Feb. 1.	6 do	9.30	
			170.50

Orders and copies to pay accounts of U. S. commissioners, chargeable as follows: Original orders, 3 fols., 45c.; seal, 20c.; filing, 10c.; copy 3 folios, 30c.; seal, 20c.; certificate, 15c.; $1.40 in the whole.

1886.			
July 2.	3 commissioners accounts	4.20	
1887.			
Jan. 6.	3 do	4.20	
April 1.	3 do	4.20	
Oct. 1.	3 do	4.20	
1888.			
Jan. 2.	1 do	1.40	
7 April 7.	3 do	4.20	
July 2.	1 do	1.40	
Oct. 1.	2 do	2.80	
1889.			
Jan. 1.	1 do	1.40	
Jan. 12.	1 do	1.40	
			29.40

Orders to pay accounts of court officers and filing vouchers—Continued.

1887.			
Jan. 31.	40 oaths and jurats to marshal's vouchers	10.00	
July 25.	36 do. do. do. do.	9.00	
1888.			
Jan. 31.	66 do. do. do. do.	16.50	
July 1.	40 do. do. do. do. do.	10.00	
1889.			
Jan. 31.	22 do. do. do. do. do.	5.50	
			51.00
1887.			
Jan. 31.	52 vouchers filed with marshal's account	5.20	
July 25.	75 do. do. do. do.	7.50	
1888.			
Jan. 31.	99 do. do. do. do.	9.90	
July 1.	112 do. do. do. do.	11.20	
1889.			
Jan. 31.	163 do. do. do. do.	16.30	
			50.10

II.

Travel and attendance upon sessions of court.

Attendance on sessions of court when the minutes do not show what business was done:

1886.		
July 1, 2, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 17	65.00	
do. 19, 21, 22	15.00	
1887.		
Sept. 17	5.00	
1888.		
May 29	5.00	
		90.00

Clerk circuit court. Attendance when the circuit court for this district was in session out of the district:

Dec. 4. 1886, and May 2d, 1887, 2 days' attendance in New York	10.00	10.00
Mileage each session, 115 miles, 230 in all		23.00

8 *U. S. Com'r.*

Commissioner's per diems disallowed because com'r was not hearing and deciding within the meaning of fee bill:

Jan. 25th and Feb. 6th, 1885, case of Holcomb (one allowed)	5.00	
March 30 and April 20, 1885, case of Richmond	10.00	
April 10th and 13th and May 29th, 1886, case of Cook	15.00	
7 days 1st half of 1886	35.00	
Dec. 1, 1886, case of Plumb	5.00	
Jan. 4, 11, 14, 1887, case of Murray (1 allowed)	10.00	
4 days last half of 1887 (2 in Walsh, 1 in Cleveland, 1 Scanlon)	20.00	
Dec. 29 and 31, 1888, case of Krotch et als	10.00	
2 days, cases of Dowd & Farnham, 2nd quarter, '88	10.00	
1 day, case of Bailey (M'ch 27th) do	5.00	
1 day, case of Milke, 4th quarter, '88	5.00	
		130.00

Commissioner's per diems disallowed because the commissioner was allowed a per diem fee for the same days as clerk of court:

1887.		
Jan. 14, 23, Feb. 8, 10, 11, 20, 24	35.00	
March 1, 2, May 8, June 22	20.00	
Case of Humphrey, 4th quarter, 1886	5.00	
Sept. 21 and 25, case of Ernst	10.00	
Sept. 23, case of Spencer	5.00	
Oct. 11, 1886, case of Willis	5.00	
Nov. 20 and 29, case of Fred Zimzner	10.00	
July 11, case of Richardson	5.00	
Sept. 10, case of Cleveland	5.00	
Aug. 12, case of Scanlon	5.00	
Oct. 11, case of Zimzner	5.00	
Nov. 21, 22, and Dec. 1 (Neubauer)	15.00	
Nov. 19, 23, Hong Gung	10.00	
Dec. 15, 20, '87, U. S. v. Wright	10.00	
Jan. 3, 1888, case of Hicks	5.00	
2 per diems, case of Bailey, M'ch 26, April 4, 1888	10.00	
		160.00

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III.

Records, copies, etc.

Recording proceedings of court:		
Cl'k circuit court:		
Circuit court minutes from Oct. 15, 1886, to Oct. 1, 1888, 282 folls	42.30	
Cl'k district court.		
Ditto district court, 195 folls	29.25	
		71.55
Reports to Attorney-General of judgments, decrees, etc.:		
Cl'k district court:		
Aug. 1, 1883. Judgments against 37 parties reported	5.50	
" 1884. do. do. 47 do.	7.05	
" 1885. do. do. 48 do.	7.20	
" 1886. do. do. 47 do.	7.05	
" 1887. do. do. 45 do.	6.75	
" 1888. do. do. 64 do.	9.45	
		43.00
4th quarter, 1888, copies of orders and certificates and seals to pay jurors, district court	4.70	
Circuit court do. do. do. do. do.	.40	
		5.10
Clerk district court:		
Making final record, 3rd quarter, 1887:		
U. S. v. Roemer, 5 folios	.75	
U. S. v. Sweeney, alias Banks, 4 fols	.60	
U. S. v. Spencer & Rose, 20 fols	3.00	
U. S. v. Sparks, 4 folios	.60	
		4.95
Trial copies U. S. v. Northfield Knife Co., cir. c't.		3.90
(Supplied for use of the judge under rule of c't.)		
Cert'f'd copies of files and records, case of U. S. v. Theo. Forest and George Smith, to Detective Bell, by order of Sup't Brooks		3.37

IV.

Entries and filings.

Entering the appearances of attorneys for the respective parties, from April 1, 1883, for one year, 19 appearances	2.85	
1884, do. do. do. 2 do.	.30	
1885, do. do. do. 24 do.	3.60	
1886, do. do. do. 10 do.	1.50	
1887, do. do. do. 73 do.	10.95	
1888, do. do. do. 57 do.	8.55	
		27.75

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V.

Case of F. M. Kenney, Com. Record, docket fee and discontinuance disallowed on ground of no case	1.15	
Do. do. A. C. Humphrey, do. do.	1.15	
		2.30
20 papers, newspaper ads., chiefly, filed in F. L. Clinton's case		2.00
Interest on money audited and payable:		
Interest at 4 per cent on $635.71 earned by me before July 1, 1886, and audited to me on or before the 22d day of December, 1886, from said date to Nov. 10, 1888, when paid. Payment was then refused by the First Comptroller until I should answer a letter of Examiner Heiskell, to the Attorney-General, which I had never seen, and of which neither the Attorney-General nor the First Comptroller would then nor since furnish me a copy, although I wrote to each of them for one, and sent to the latter $5 in money to pay the cost of making and sending one		47.87

VI.

Clerk circuit court.

Reports under section 768, making and filing, Sept. term, 1888, circuit court	1.00

VII.

Orders entered as U. S. commissioner.

1883.				
April	17.	E. B. Pelton, order fixing bail	.15	
"	"	do. order discharging	.15	
"	"	Elna Pelton, order fixing bail	.15	
"	"	" " " discharging	.15	
May	1.	W. H. Booth, order fixing bail	.15	
May	2.	do. do. do. do. do.	.15	
		do. do. do. discharging do	.15	
May	3.	Joseph Cameron, order fixing bail	.15	
		do. do. order discharging	.15	
Nov.	10.	Pat'k Ryan, order fixing bail	.15	
Dec.	10.	do. do. order to hold	.15	
		do. do. do. fixing bail	.15	
1884.				
Jan.	5.	F. B. Harwood, order fixing bail	.15	
		do. do. order to hold	.15	
		do. do. do. fixing bail	.15	
				2.25
11 Dec.		3, '83. Paddy Byron, order fixing bail	.15	
		15, " do. do. order to hold	.15	
Do.		do. do. order fixing bail	.15	
1884.				
Jan.	16.	Hewitt and Quinn, order fixing bail	.15	
	17.	do. do. do. do. do. do.	.15	
		Order discharging Quinn	.15	
	23.	Order to hold Hewitt	.15	
		Order fixing bail do.	.15	
Feb.	6.	F. Branch, order fixing bail	.15	
	8.	do. order to hold	.15	
		do. order fixing bail	.15	
Feb.	7.	James Collins, order fixing bail	.15	
	9.	do. do. order to hold	.15	
		do. do. order fixing bail	.15	
April	19.	Arthur Renier, order fixing bail	.15	
May	20.	do. do. order to hold	.15	
Do.		do. do. order fixing bail	.15	
Do.		J. J. Brewer, order fixing bail	.15	
June	14.	Kochler, order fixing bail	.15	
	20.	do. order to hold	.15	
Do.		do. order fixing bail	.15	
Nov.	18.	A. Bernstein, order fixing bail	.15	
Nov.	21.	do. order to hold	.15	
		do. order fixing bail	.15	
Nov.	21.	Anderson and Waterman, discharging	.15	
1885.				
Jan.	31.	H. Herman, fixing bail	.15	
Feb.	2.	do. order to hold	.15	
Do.		do. order fixing bail	.15	
March	16.	H. L. Willis, order to hold	.15	
Do.		do. order fixing bail	.15	
March	8.	J. W. Richmond, order fixing bail	.15	
April	20.	do. order to hold	.15	
Do.	do.	do. order fixing bail	.15	
Do.	10.	J. D. Cooke, order to hold	.15	
Do.	do.	do. order fixing bail	.15	
Do.	do.	C. B. Thompson, order fixing bail	.15	
Do.	20.	do. order to hold	.15	
Do.	do.	do. order fixing bail	.15	
Do.	10.	do. order fixing bonds	.15	
Do.	do.	do. order to discharge	.15	
Do.	do.	do. order fixing bail	.15	
Do.	do.	do. order to discharge	.15	
Do.	20.	do. order to hold	.15	
Do.	do.	do. order fixing bail	.15	
Do.	10.	do. order fixing bail	.15	
Do.	do.	do. order to discharge	.15	

Orders entered as U. S. commissioner—Continued.

	1885.			
April	28.	D. Maher, order fixing bail	.15	
May	2.	do. order to hold	.16	
		do. order fixing bail	.15	
				7.20
12 Nov.	21.	G. A. Session, order fixing bail	.15	
Nov.	30.	do., order to hold	.15	
	Do.	do., order fixing bail	.15	
Nov.	7.	J. Farney, order fixing bail	.15	
Nov.	23.	P. Chute, order fixing bail	.15	
Nov.	28.	do., order to hold	.15	
	Do.	do., order fixing bail	.15	
Nov.	20	J. Farney, order to hold	.15	
	Do.	do., order fixing bail	.15	
Nov.	25.	Thomas O'Connell, order to hold	.15	
	Do.	do. do., order fixing bail	.15	
Dec.	7.	P. Dooley, order fixing bail	.15	
Dec.	9.	do., do. to hold	.15	
	Do.	do., do. fixing bail	.15	
Dec.	26.	B. C. Thompson, order fixing bail	.15	
	1886.			
Jan.	23.	do. do., order to hold	.15	
	Do.	do. do., order fixing bail	.15	
Jan.	21.	S. Beach, order fixing bail	.15	
	26.	do., order to discharge	.15	
Jan.	18.	Edward Bisher, order fixing bail	.15	
Jan.	22.	do. do., order to discharge	.15	
Jan.	14.	Manna Alderman, order fixing bail	.15	
	Do.	do., order to discharge	.15	
Jan.	22.	Edward Bisher, order fixing bail	.15	
	23.	do. do., order to hold	.15	
	Do.	do. do., order fixing bail	.15	
Jan.	15.	George J. Hinman, order fixing bail	.15	
	29.	do. do., order to discharge	.15	
Jan.	18.	Duell H. Holcomb, order fixing bail	.15	
	Do.	do., order to discharge	.15	
Jan.	20.	Chas. Bunnell, order fixing bail	.15	
	Do.	do., order to hold	.15	
Feb.	8.	do. do., order fixing bail	.15	
Feb.	24.	Chas. E. Bement, order fixing bail	.15	
March	10.	do. do., order to hold	.15	
	Do.	do. do., order fixing bail	.15	
Feb.	24.	George Coleman, order fixing bail	.15	
March	10.	do. do., order to hold	.15	
July	14.	F. N. Plumb, order fixing bail	.15	
Feb.	10.	Warner, Nichols & Martin, do. do	.15	
Feb.	11.	Nichols & Warner, order fixing bail	.15	
Feb.	26.	F. J. Martin, order fixing bail	.15	
March	1.	Warner, order to discharge	.15	
March	2.	Martin & Nichols, 2 orders fixing bail	.30	
Do.	do.	do. do., orders to hold	.30	
Feb.	20.	H. E. Smith, order fixing bail	.15	
	Do.	do. do., order to hold	.15	
May	5.	B. C. Thompson, order fixing bail	.15	
				7.50
13 May	8.	do. do., order to hold	.15	
June	22.	M. Getz, order fixing bail	.15	
	Do.	do., order to hold	.15	
Sept.	7.	A. C. Humphrey, order fixing bail	.15	
	Do.	do. do., order to hold	.15	
Sept.	21.	Augusta Ernst, order fixing bail	.15	
	25.	do. do., order to hold	.15	
	Do.	do. do., order fixing bail	.15	
Sept.	23.	E. E. Spencer, order to discharge	.15	
Nov.	20.	Fred. Zinsser, order fixing bail	.15	
	1887.			
Jan.	28.	do. do., order to discharge	.15	
Jan.	4.	Jas. Murray, order fixing bail	.15	
Jan.	14.	do. do., order to hold	.15	
	Do.	do., order fixing bail	.15	

Orders entered as U. S. commissioner—Continued.

1887.			
April	13.	Geo. H. Bacon, order to discharge	.15
July	11.	Geo. H. Richardson, do. do. do.	.15
June	27.	do. do., order fixing bail	.15
July	23.	John Walsh, order fixing bail	.15
Sept.	29.	do. do., order to discharge	.15
Aug.	6.	Reed Cleveland, order fixing bail	.15
Sept.	20.	do. do., order to hold	.15
Do.	do.	do. do., order fixing bail	.15
Aug.	12.	J. Scanlon, order fixing bail	.15
Sept.	6.	do. do., order to discharge	.15
Nov.	19.	Hong Gung, order fixing bail	.15
Nov.	21.	do. do., order to discharge	.15
Nov.	21.	G. W. Neubauer, order fixing bail	.15
Dec.	1.	do. do., order to hold	.15
Do.		do. do., order fixing bail	.15
Dec.	15.	H. J. Wright, order fixing bail	.15
Dec.	22.	do. do., order to hold	.15
Dec.	22.	H. J. Wright, order fixing bail	.15
Dec.	29.	Aug. Kelner, order fixing bail	.15
'88.			
Jan.	10.	do. do., order to discharge	.15
'87.			
Dec.	31.	Dorf and Giesdorf, 2 orders fixing bail	.30
'88.			
Jan.	10.	do. do. do., 2 orders to disch	.30
'87.			
Dec.	29.	Wm. Kratch, order fixing bail	.15
1888.			
Jan.	10.	do. do., order to hold	.15
Do.	do.	do., order fixing bail	.15
Feb.	11.	Nichols Bros., order fixing bail	.15
		Do. do., order to discharge	.15
Jan.	11.	P. Fuller, order fixing bail	.15
Jan.	18	do., order to hold	.15
Do.	do.	do, order fixing bail	.15
Feb.	27.	John Costello, order fixing bail	.15
Do.	do.	do., order to hold	.15
March	19.	W. C. Griswold, order fixing bail	.15
Do.	23.	do. do., order to discharge	.15
March	9.	do. do., order fixing bail	.15
			7.65
14 March	23.	do. do., order to hold	.15
	Do.	do. do., order fixing bail	.15
	Do.	17. J. R. Sloane, do. do. do.	.15
April	3.	do. do., order to discharge	.15
March	26.	H. W. Bailey, order fixing bail	.15
		Do., order to discharge	.15
July	5.	L. D. Dowd, order fixing bail	.15
	Do.	do., order to discharge	.15
Aug.	6.	J. D. Farnham, order fixing bail	.15
Aug.	8.	do. do., order to hold	.15
Do.		do. do., order fixing bail	.15
Nov.	6.	O. R. Milcke, order fixing bail	.15
	Do.	do., order to discharge	.15
Dec.	20.	Geo. R. Case, order fixing bail	.15
Dec.	29.	do. do., order to hold	.15
Do.	do.	do. do., order fixing bail	.15
Dec.	20.	A. H. Case, order fixing bail	.15
Dec.	29.	do. do., order to hold	.15
Do.		do do., order fixing bail	.15
1889.			
March	19.	Kate Sullivan, order fixing bail	.15
			3.00
Entering 128 continuances, from time to time, in above cases			19.20

VIII.

Commissioner's docket fees. Dockets since Jan. 1, 1887.

Jan.	4.	J. Murray	3.00	
March	28.	Geo. H. Bacon	3.00	
June	27.	Geo. H. Richardson	3.00	
July	23.	John Walsh	3.00	
Aug.	6.	Reed Cleveland	3.00	
Nov.	25.	Thos. O'Connell	3.00	
Aug.	12.	John Scanlon	3.00	
Nov.	19.	Hong Gung	3.00	
Nov.	21.	Geo. W. Neubauer	3.00	
Dec.	15.	H. J. Wright	3.00	
Dec.	29.	Aug. Kelner	3.00	
1888.				
Feb.	11.	Nichols Bros	3.00	
Jan.	11.	Phelps Tuller	3.00	
Feb.	27.	John Costello	3.00	
March	9.	W. C. Griswold	3.00	
March	17.	J. R. Sloane	3.00	
March	9.	W. C. Griswold	3.00	
Do.	26.	H. W. Bailey	3.00	
July	5.	L. D. Dowd	3.00	
Aug.	6.	J. D. Farnham	3.00	
Nov.	6.	O. R. Milcke	3.00	
Dec.	20.	G. R. Case	3.00	
Dec.	29.	Asa H. Case	3.00	
'89.				
March	13.	Kate Sullivan	3.00	
				72.00

15 IX.

Commitments upon continuance.

In the account for half year ending Dec. 31, 1885, case of Farney and Ryan, two temporary warrants were charged for, at the rate of $2.05, $4.10 in all. Of this 25c. was allowed and the rest disallowed. There should have been allowed and paid for these warrants $3.60. Balance due					3.35	
In half year ending July 1, 1886, 2 in Nichols & Martin, charged at 3.60, and disallowed					3.60	
Do.	do.	do.	do.	1 in Coleman	1.80	
Do.	do.	do.	do.	1 in Bement	1.80	
In half year ending June 30, '87 in Bacon					1.80	
In half year ending Dec. 31, '87, in Lee Ann Gung					1.80	
						14.15

X.

Acknowledgments of the principal party to their recognizances.

1st half of 1886, 1 disallowed			.25	
1st half of 1887, 3	do.		.75	
2nd half of 1887, 5	do.		1.25	
Qr. ending Dec. 31st, '87, 9	do		2.25	
1st qr., 1888, 27	do.		6.75	
3rd qr., 1888, 2	do.		.50	
1st qr., 1889, 25	do.		6.25	
2nd qr., 1889, 1	do.		.25	
				18.25

XI.

Excess in commissioner's records deducted.

1st half, 1886, $8.80 as excessive; only 55c. was excessive; balance due		8.35	
1st half 1887, $1.90 as excessive; there was no excess		1.90	
Last half 1887, $2.10 as excessive; actual excess, 80c; balance due		1.30	
In the case of Farney, 1st half '88, 40c. as excess, when record is 60c. in excess of charge		1.00	
			12.55
16 1st qr., '88, cases of Krotch, Kelner, Costello & Griswold, $3.90 deducted as excess; actual excess, $1.70		2.20	2.20

XII.

Commissioners' subpœnas deducted as excessive.

1 in case of Thompson, last half, '85	.50	
4 in case of James Murray, 1st half, '87	2.00	
		2.50

XIII.

Reports of the substance of the case where monies are paid in.

Cl'k dist. court—Reports of cases to depositary, Secretary of Treasury, Com'r Int. Rev.; being 3 reports wherever money was paid over by the clerk.		
In case of U. S. v. Jas. L. Howard, 3 reports, 3 folios each—9 folios	1.35	
First quarter, '87, U. S. v. Hess, 3 reports, 2 folios each—6 folios	.90	
First quarter, '87. U. S. v. Wooster, do. do. 2 folios each—6 folios	.90	
First quarter, '87, U. S. v. Scanlon, do. do. 2 folios each—6 folios	.90	
First quarter, '89, U. S. v. Story, 2 do. do. 2 folios each—4 folios	.60	
First quarter, '89, 3 reports, 2 folios each, case Spencer & Rose	1.35	
First quarter, '89, 3 reports, 2 folios each, case of Clinton	1.35	
Errors claimed generally, 2d quarter, '89, 14 reports, 2 folios each—28 folios	4.20	
		11.55

XIV.

Errors.

In account 1st half of 1886, 75c. was deducted for entering orders appointing guardians	.75	
Errors in addition "Miscellaneous," dist. cl'k's acc't, 2d quarter, '89, deducted. (There was no error in addition.)	1.75	
Error in addition claimed, 1st quarter, 1889. No such error.	.40	
		2.90

17

XV.

Recording names and residences of the jurors elected and put in the boxes annually ($3 *circ't,* $9 *dist.*).

Aug. 1, '83. Recording names and residences of jurors put in each jury box, 5 boxes, 16 folios, or 400 names to the box, 80 folios	12.00	
Aug. 1. '84. Do. do. do. do. do	12.00	
Do. '85. Do. do. do. do. do.	12.00	
Do. '86. Do. do. do. do. do.	12.00	
Do. '87. Do. do. do. do. do.	12.00	
Do. '88. Do. do. do. do. do.	12.00	
		72.00

XVI.

Miscellaneous.

U. S. Com'r:		
Oct. 2, 1887, aff'd't of Rowland Swift, 5 folios, 75c.; oath and jurat, 25c.; filing, 10c.; filing compl't, 10c.; warrant, $1.	2.20	2.20
Cl'k dist. court:		
2nd qr., 1889, entering motion to reduce bond, case of John Barry, entering denial of motion (the same having been taxed against accused by clerk and paid by him to U. S	.30	
2nd qr., '89, deductions in case of Massacotte, as excessive, of clerk's fees. (These fees were paid as taxed to U. S. by the accused and were less than the law allows, as will appear)	.40	
2nd qr., '89, 60c. deducted for entering motions and orders appointing guardians of Trepannier and Carmody, minors, before plea (the fees therefor having been paid by defendants)	.60	
2nd qr., '89, 40c. deducted for entering motion for and order giving leave to file pleas nolo contendere and filing plea, the same having been taxed against accused by the clerk and paid by him to U. S	.40	
2d qr., '89, $3.15 deducted as for entries of payment of fine and costs and discharge; 60c. of this was for orders to discharge, which is no longer claimed; the remainder should be allowed.	2.55	
		4.25

18 XII.

Copies of bills of costs furnished in compromised internal-revenue cases.

To copy of costs furnished dist. att'y in int. rev. cases, before judgment, 10c.; like copy after judgment, certified, 25c.; making 35c. in all, in the following cases, viz:

1885. J. Bernstein, 35c.; Peter Corr, 35c	.70
Bertha Palm, 35c.; Thos. O'Connell, 35c	.70
G. A. Session, 35c.; 3 galls. of Rum, 35c	.70
1886. P. Dooley, 35c.; C. Bunnell, 35c	.70
M. C. Ryan, 35c.; B. C. Thompson, 35c	.70
M. Getz, 35c.; E. Leopold, 35c	.70
1887. J. McNamara, 35c.; A. P. Hotchkiss, 55c	.70
G. C. Carr, 35c.; A. E. Hanchett, 35c	.70
E. C. Beach, 35c.; 600 galls. Cider Brandy, 35c	.70
L. Schutt, 35c.; C. G. Euerle, 35c	.70
W. W. Doane, 35c.; R. Cleveland, 35c	.70
1888. M. McLeone, 35c.; E. Buddington, 35c	.70
Wilson & Crippen, 35c.; M. Henrietta, 35c	.70
M. Raynor, 35c.; 1 Copper Still, 35c	.70
E. B. Bennett, 35c.; P. Tuller, 35c	.70
H. J. Wright, 35c.; M. Chidsey, 35c	.70
1889. 1 copper still, 35c.; G. R. Case, 35c	.70
A. H. Case, 35c	.35
	1,200.39

19 7. That the United States, the defendant therein, has never paid the same.

The plaintiff claims thirteen hundred dollars damages.

Wherefore your petitioner prays this honorable court that it will take this petition into consideration and will find and pass upon the facts and law in question and will render judgment in favor of the plaintiff for the said amount of money claimed; and your petitioner, as in duty bound, will ever pray.

EDWIN E. MARVIN,
Petitioner.

STATE AND DISTRICT OF CONNECTICUT,
Hartford County, ss:

Personally appeared Edwin E. Marvin, who subscribed the foregoing petition, and who, being duly sworn, deposes and says that he has read the foregoing petition and carefully examined all the allegations therein contained, and that he verily believes the same to be correct and true.

EDWIN E. MARVIN.

Subscribed and sworn to before me this 6th day of April, 1889.

[SEAL.] RICH'D F. CARROLL,
Notary Public.

DISTRICT OF CONNECTICUT, *ss:*

I, Edwin E. Marvin, the petitioner named in the foregoing petition, being duly sworn, do depose and say that on the 6th day of April, A. D. 1889, about three o'clock and thirty minutes p. m., I gave notice of the pendency of the suit commenced by said petition, by serving upon

20 George G. Sill, esq., United States attorney for the district of Connecticut, a copy of said petition, certified under seal of the U. S. circuit court for this district, by delivering the same to him personally;

and on the same day and hour I mailed a like copy of the same by registered letter to Hon. W. H. H. Miller, the Attorney General of the United States, at Washington, D. C.

EDWIN E. MARVIN.

Subscribed and sworn to before me this 6th day of April, A. D. 1889.

RICH'D F. CARROLL,
Notary Public.

(Registry return receipt.)

And on the 8th day of May, 1889, George G. Sill, esq., entered his appearance for the defendant.

And on the 9th day of April, 1889, amendment to petition was filed in the words and figures following, viz:

United States circuit court, district of Connecticut.

EDWIN E. MARVIN
vs.
THE UNITED STATES.

The plaintiff amends his petition herein by adding to the items of paragraph 2:

To acting as jury commissioner ex officio in connection with the jury commissioner in filling the jury boxes, three days each, for the following terms: District court, August and December, 1887; Feb., May, Aug., and Dec., 1888; Feb. and May, 1889; circuit court, Sept., 1887; April and Sept., 1888; April, 1889; 33 days, at $5 per day..... 165.00

He further amends the ad damnum paragraph of said petition by making the same fifteen hundred dollars instead of thirteen hundred dollars.

E. E. MARVIN,
Petitioner.

DISTRICT OF CONNECTICUT,
Hartford County, ss:

Personally appeared Edwin E. Marvin, who subscribed the foregoing amendment, who, being duly sworn, deposes and says that the items of service contained in this amendment have been rendered by him and the fees therefor are still justly due.

E. E. MARVIN.

Subscribed and sworn to before me this 9th day of April, A. D. 1889.

[SEAL.] RICH'D F. CARROLL,
Notary Public.

DISTRICT OF CONNECTICUT, *ss:*

I, Edwin E. Marvin, the petitioner named in the foregoing petition, being duly sworn, do depose and say that on the 9th day of April, A. D. 1889, about 10:30 o'clock a. m., I gave notice of the filing of the foregoing amendment by serving upon George G. Sill, esq., United States attorney for the district of Connecticut, a copy of said amendment by delivering

the same at his office into the hands of his clerk, Geo. Elliott Sill,
22 personally; and on the same day and hour I mailed a like copy of the same by registered letter to Hon. W. H. H. Miller, Attorney General of the United States, at Washington, D. C.

Attest:

E. E. MARVIN,
Clerk.

Subscribed and sworn to before me this 9th day of April, A. D. 1889.

RICH'D F. CARROLL,
Notary Public.

And on the 19th day of June, 1890, amendment to petition was filed in the words and figures following, viz:

United States circuit court, district of Connecticut.

EDWIN E. MARVIN, *vs.* THE UNITED STATES. } No. 354. Law.

Amendment to complaint.

The complainant amends his complaint herein by adding the following items to the paragraphs successively as follows, viz:

1.

To deductions from the clerk's the charges for orders to pay the officers of court, per auditor's rep ..... 115517..... 1.25
" " " " " 116975..... 2.85
" " " " " 120093..... 4.50
To marshal's oaths and jurats before plaintiff as commissioner in cases of Thompson, Sullivan, Ruppert, Sichler, Newton, and Howson, 2 in each case, at 25c.... 3.00
To 32 do before pl'ff as clerk, Sept. 1, 1889, less 2.10 pd..... 5.90
" 16 " " " " " 3rd qr., 1889..... 4.00
" 1 " " " " " 1st " 1890..... .25
" 26 " " " " " Feb. 14, 1890..... 6.50
23 To filing and entering 94 marshal's vouchers, less 60c. allowed..... 8.80
do. do. do. do do July 1, 1889 ..... 8.00
7 oaths as to sufficiency of bail, deducted Auditor's Report 118529..... .70
4 do. do. do 120082..... .40

2.

To 6 days' hearing and deciding on criminal charges, deducted by Auditor's Report 120082..... 30.00
To serving as acting jury com'r 3 days before each term of court since May 1, 1889, 18 days..... 90.00

3.

7 seals on orders and copies deducted by Auditor's Report 118544..... 1.40
Report to Attorney General of 62 judgments, Aug. 1, 1889..... 9.30

4.

Entering appearances for claimant, U. S. v. 1 Copper Still..... .15
" " etc., deducted Aud. Rep. 120093 ..... 1.80
" " " " " 118544 ..... 7.65

Amendment to complaint—Continued.

7.

To commissioner's orders continuing cases holding to court and fixing bail in cases U. S. v. F. S. Thompson, 4; F. K. Benjamin, 4; A. Nepel, 2; P. J. Sullivan, 2; F. D. Allen, 2; M. A. Hart, 2; S. O. Goodwin, 2; E. Kilbourne, 2; S. B. Newberry, 2; Geo. G. Carr, 2; H. C. Newton, 4; M. J. Brewer, 2; Geo. A. Baker, 2; J. C. Howson, 4; L. Ruppert, 2; Geo. Sichler, 2; W. A. Lawton, 2; A. Mitchelson, 8; Crawford, 2..... 7.80

8.

Commissioner's docket fees in cases at issue and evidence given; Thompson, Nepel, Sullivan, Newton, Howson, Ruppert, and Sichler, $3 each..... 21.00
In cases against Benjamin, Allen, Duncan, Hart, Goodwin, Kilbourn, Newberry, Carr, Brewer, Baker, Fuller, Lawton, Mitchelson, Crawford, Williams, no issue nor evidence, $1 each..... 15.00

10.

5 acknowledgments of bail by the accused, deducted by Auditor's Report 116979..... 1.25
11 do. do deducted by Auditor's Report 118529..... 2.75
1 do. do. " " " " 120082..... .25

24

11.

43 folios of the transcripts of commissioner's records holding to court, deducted by Auditor's Report 118529..... 6.45
4 do. do. do. do. do. do. do. 120082. .40

13.

80 reports to Government officials as to cases accompanying certificates of deposit of fines and costs, deducted per Auditor's Report 118544, 2 folios each, 30c 24.00
10 do. do. do. do. 120093, " " " 3.00

17.

2 copies taxed bill of costs in int. rev. cases, for Com'r Int. Rev., furnished by request of dist. att'y, 1 folio each, final one certified, in following cases: vs. 608 Pck'gs Oleo., H. Verrier, A. Clark, F. K Benjamin, J. C. Howson, E. Klaus, J. D. Valera, R. Fuenti, M. O'Connell, 35c. in each case..... 3.15

$271.60

The plaintiff further amends the ad damnum clause of said petition by making the amount claimed seventeen hundred dollars.

E. E. MARVIN,
Petitioner.

DISTRICT OF CONNECTICUT,
Hartford County, ss:

Personally appeared Edwin E. Marvin, who subscribed the foregoing amendment, who, being duly sworn, deposes and says that the items of service stated therein have been rendered by him, and that the fees therefor are still due.

E. E. MARVIN.

Subscribed and sworn to before me this 19th day of June, 1890.

RICH'D F. CARROLL,
Notary Public.

25 DISTRICT OF CONNECTICUT, *ss:*

I, Edwin E. Marvin, the plaintiff herein, being duly sworn, depose and say that at 10 a. m. June 19, 1890, I served a copy of the foregoing amendment upon Geo. G. Sill, esq., the attorney of the United States in the district of Connecticut, by delivering the same to him, and at the same time I mailed a like copy of the same, by registered letter, to the Attorney General of the United States.

E. E. MARVIN.

Subscribed and sworn to before me this 19th June, 1890.

RICH'D F. CARROLL,
Notary Public.

(Registry return receipt.)

And on the 18th day of November, 1890, amendment to petition was filed, in the words and figures following, viz:

United States circuit court, district of Connecticut.

EDWIN E. MARVIN
vs.
UNITED STATES. } No. 354. Law.

Amendment to complaint.

The complainant amends his complaint herein by adding the following items to the paragraphs successively as follows, viz:

1.

To items of orders to pay officers of court, per Treas. Report No. 121843.		1.80	
Ditto " " " 123523.		8.95	
26 Ditto as to vouchers		11.70	
Ditto as to jurats		2.75	
			25.20

2.

To 5 days' hearing and deciding on criminal charges, deducted by Report No. 121798	25.00	
To charges as acting jury com'r by repts. 121531 and 121533	30.00	
3 days for Dec. term, '90	15.00	
		70.00

3.

To excess of final records deducted by Report 123533, Item 5	11.55	
To seals on copies of orders per Rep't 121841	.40	
" " 121843	1.20	
" " 123533	3.85	
To recording proceedings in minutes disallowed by 123531 and 123533	14.60	
		31.60

7.

To commissioner's orders, case of Teams and Williams, by Rep't 121798	1.20	1.20

8.

To docket fees suspended Rep't 121798	4.00	4.00

9.

To warrant deducted by Report 121798	1.10	1.10

10.

To acknowledgments disallowed by Rept. 121798	.50	.50
To report deducted by Report 123533	1.20	1.20

EDWIN E. MARVIN,
Petitioner.

DISTRICT OF CONNECTICUT,
Hartford County, ss:

Personally appeared Edwin E. Marvin, who subscribed the foregoing amendment, who, being duly sworn, deposes and says that the items of service stated therein have been rendered by him and that the fees therefor are still due.

EDWIN E. MARVIN.

27 Subscribed and sworn to before me this 18th day of November, 1890.

RICH'D F. CARROLL,
Notary Public.

DISTRICT OF CONNECTICUT, *ss:*

I, Edwin E. Marvin, the plaintiff herein, being duly sworn, do depose and say that at 4 o'clock and 20 minutes p. m., November 18, 1890, I served a copy of the foregoing amendment to complaint upon Geo. G. Sill, esq., of Hartford, attorney of the United States for the district of Connecticut, by delivering the same to him personally, and at the same time I mailed a like copy of the same by registered letter to the Attorney General of the United States.

E. E. MARVIN.

Subscribed and sworn to before me this 19th day of November, 1890.
[SEAL.] RICH'D F. CARROLL,
Notary Public.

(Registry return receipt.)

And at the term of said court held at Hartford on the third Tuesday of September, 1890, the petitioner appeared for himself and George G. Sill, esq., appeared for the United States, and said cause was fully heard. And on the 19th day of December, 1890, opinion of court thereon was filed, in the words and figures following, viz:

28 Circuit court of the United States for the district of Connecticut.

EDWIN E. MARVIN
vs.
THE UNITED STATES.

SHIPMAN, J. This is a petition under the act of March 3, 1887 (24 St., 505), to recover fees and charges of the petitioner as clerk of the district and circuit courts of the United States for this district as circuit court commissioner and as jury commissioner ex officio, which have been disallowed by the Treasury Department, and which are specifically and by items set forth in the petition. The earliest item is dated August 1, 1883. The United States denied, in fact, the petitioner's right to recover, and appeared upon the hearing of the cause by the district attorney for this district.

The said cause having been heard, the following facts are found by the court:

All the allegations of fact in said petition are found to be true; the services and expenses charged therein and in the various amendments thereto were actually rendered and expended; the acts alleged in said petition and amendments to have been done and performed were done and performed, and the time therein alleged to have been spent as clerk, commissioner of the circuit court, and jury commissioner ex officio was spent.

The said items mentioned in the petition were included in the petitioner's accounts, which were duly presented to the judge of the district
29 court, were approved, and forwarded to the accounting officer of the Treasury, except the item of interest, hereinfter mentioned.

The liability of the United States depends entirely upon the construction which ought to be given to the statutes pertaining to the subject of fees and the payment thereof.

1. The first matter in dispute relates to the proper amount of the clerk's fees upon orders of court to pay the accounts of the marshal and other officers, upon his fees for administering the oaths and subscribing the jurats attached to each one of the marshal's vouchers, and for filing these vouchers.

No clerk's fees were paid for a time upon the orders of court which allowed these accounts. I had occasion to examine this subject in Stanton v. U. S. (37 Fed. Rep., 252), and was of opinion that the United States were liable for this class of fees. Other judges have been of the same opinion. (Erwin v. U. S., 37 Fed. Rep., 470; Jones v. U. S., 39 Fed. Rep., 410; Goodrich v. U. S., 42 Fed. Rep., 392.) And the present Comptroller coincides therewith, but claims that the petitioner's fees are too large. The clerk annexes to both the duplicate accounts an order signed and sealed, whereas the Comptroller allows for an original order, which is retained in the clerk's office, and for a copy thereof annexed to the account which is sent to Washington.

The difference in regard to the orders to pay commissioners is that the clerk makes and files a sealed order, whereas the Comptroller is willing to allow for a recorded order without seal or filing. The difference upon commissioners' orders is thirty cents per order and upon orders to pay other officers is thirty-five cents per order.

30 In regard to the orders upon accounts of officers other than commissioners, the statute (18 St., 333) requires only a single order to be entered of record. "The law requires the account to be made in duplicate, but not the order approving the account. The original account, with a certified copy of the order, is forwarded to the Treasury Department, and the duplicate account is retained by the clerk and filed in his office." (Jones v. U. S., 39 Fed. Rep., 410.) I do not think that it is necessary that this order should be sealed. An order of court signed by the judge is sufficient. It should be said that the clerk was not notified by the First Comptroller's Office of its desire that a more economical course should be adopted until April 1, 1889. The charges for these services should be, as now claimed by the Comptroller, entering order, 45 cents; copy, 30 cents; certificate, 15 cents; seal, 20 cents; filing duplicate, 10 cents; total, $1.20.

The statute requires that only one copy of the commissioner's account should be presented which is forwarded to the Department. A certified copy of the order of court should accompany it. The fees for the service should be as follows: 45 cents for entering the order approving the account; 10 cents for filing the same; 30 cents for copy; 35 cents for certificate and seal; total, $1.20.

The next question relates to the propriety of the charge of twenty-five cents for each jurat affixed to the abstracts of payment of witnesses, jurors, bailiffs, as well as to the accounts current to which they belong. The blanks which were furnished by the Treasury Department contained these jurats, and indicated the intention of the Department that each
31 separate account should be sworn to. Of late, if I am correctly advised, these separate oaths are not required. Inasmuch as they were required, they are to be paid by the Government, at the rate of 25 cents for each jurat.

The Government also objects to the charge of ten cents for filing each voucher returned by the marshal with his accounts. Each voucher is a separate, unattached paper, and both convenience and neatness require that they should be marked and filed.

The charge is allowed by the statute and is due. It has been allowed in Goodrich v. U. S. (35 Fed. Rep., 193); Erwin v. U. S., supra; Jones v. U. S., supra.

2. The second subject relates to the "per diems" for attendance and services as clerk, as circuit-court commissioner, and as jury commissioner ex officio.

The first item in dispute is $80.00 for sixteen days' attendance as clerk, in July, 1886, when the minutes do not show what business was done. The appropriation bill of August 4, 1886 (24 St., 253), provided that no part of the money appropriated by the act should be used in the payment of a per diem compensation to a clerk or marshal for attendance in court, except for days when business was actually transacted in court.

This means business which belongs to the court, and is transacted by the judge, and places upon the clerk the burden of showing that business of the court was actually transacted on those days. The minutes simply show that the court was opened and adjourned, and although the petitioner says that, doubtless, business of the court was transacted, he does not
32 show what it was, within the proper meaning of that language, and I am, therefore, compelled to disallow the item. For other charges for attendance as clerk and mileage the Government is liable.

The next item under this head relates to commissioner's "per diems," which were suspended because under the construction of the fee bill which the Treasury Department adopted the petitioner was not hearing and deciding "a criminal case."

The time charged was actually spent by the petitioner upon the cases in his judicial character as commissioner after the accused were arrested and brought before him for trial. The cases were then continued for reasons which were satisfactory to him; one party or the other was not ready for trial. The facts are substantially the same with those in Jones v. U. S. (134 U. S., 486), in which the commissioner's "per diems" were allowed. The same ruling had previously been made in Rand v. U. S. (36 Fed. Rep., 671).

The next item is for commissioner's "per diems" disallowed because he was allowed a "per diem" fee for the same days as clerk of court. The general question was considered in Saunders v. U. S. (120 U. S., 126), when it was held that when the functions of two appointments or offices which are held by one person, and to each of which compensation is attached, are separate and distinct, he is in such case entitled to recover the two compensations. The particular question was discussed in Erwin v. U. S., supra, and I accord with the conclusion of Judge Speer that the commissioner is entitled to his statutory fee of $5.00 for services performed upon any one day, although upon the same day he performs
33 services as clerk, for which he also receives a "per diem."

The clerk claims compensation for the services performed as jury commissioner ex officio from and after 1887 in accordance with the allowance made to jury commissioners in the various annual appropriation acts. The work requires the time that is charged; it devolves upon the clerk simply by virtue of the statute of June 30, 1879 (21 St., 43), which, in fact, made two persons jury commissioners, and the construction which gives compensation to only one commissioner and compels the clerk to do the work for nothing seems to be a narrow one.

I think that the clerk is a jury commissioner ex officio and comes within the provisions of the statutes which give compensation to jury commissioners (Erwin v. U. S., supra; Goodrich v. U. S., 42 Fed. Rep., 392).

3. The next class relates to fees for records of the proceedings of the court upon its minute books and fees for annual reports to the Attorney General of judgments, discontinuances, etc., for the year.

The fees for recording the proceedings of court are now allowed and paid without objections at the rate of 15 cents per folio, and the charge does not seem to be now contested, so that further discussion of the matter is unnecessary. The unpaid charges are allowed.

The Attorney General calls for an annual statement of the number of judgments, discontinuances, and other statistics in regard to the cases in court for the preceding year. The work of preparing the material and making the abstract is a considerable one, though at last the tab-
34 ulated condensed statement is not more than a folio. As the clerk had to search for all judgments, he has charged according to the allowance in the fee bill for searches. I think this charge inadmissible and that the petitioner can recover only for the final abstract or report at the rate of fifteen cents per folio.

The next item if for copies of orders to pay jurors in the fourth quarter of 1888, which were disallowed. I do not know the reason for the disallowance as a whole. They were previously and are now allowed. The charge for seals upon copies of this class of orders is contested. The original order of court is without seal, but a certified copy of an order of court should, as it seems to me, if in proper form, be attested by the seal of the court.

The next question arises upon fees for final records in criminal cases. The Treasury Department allows for four folios in each case and rejects the excess above that number. There can be no such arbitrary rule for the payment of records, some of which are necessarily voluminous. The length of the record varies with the nature of the indictment, and there is no propriety in a rule which limits the payment of the recording of fifty folios to 60 cents, the fee for recording four folios.

An examination shows that the clerk is entitled to $13.93 instead of $16.50 as charged. Charges for copies of files which were furnished, either by order of court or by order of the superintendent of the detective service, which have been unpaid are hereby allowed.

4. This question is whether the clerk is entitled to a fee of fifteen
35 cents for entering in the docket the oral appearances of the attorney in criminal cases. I do not think that this entry comes within the provision for "making any record, certificate, return, or report," but it is included within the services which are paid for by the docket fee, and the charge is therefore disallowed.

5. Docket and discontinuance clerk fees were disallowed in two cases, where the commissioner's records were returned to court and docketed and the cases were then discontinued by the attorney before an information was filed. The fees were disallowed upon the ground that, until an information is filed, there is no case in court. This question was considered in Stanton v. U. S. (37 Fed. Rep., 252), wherein it was held that the fees are properly chargeable. A charge of ten cents each for filing twenty separate exhibits in a criminal case is allowed.

6. Interest at four per cent for twenty-three months is claimed upon $635.71, audited in favor of the clerk on December 22, 1886, payment of which amount was withheld until November 10, 1888, for an immaterial reason. The appropriation was not exhausted. The statute under which this petition is brought (24 St. 505) is one enlarging the jurisdiction of the Court of Claims and giving a concurrent jurisdiction in the specified cases to the district and circuit courts. In the statute relating to the Court of Claims (Rev. St., sect. 1091) it is provided that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims unless upon a contract expressly stipulating for the payment of interest. This provision was held in Tillson v.
U. S. (100 U. S. 43) to be imperative against the allowance of in-
36 terest by the Court of Claims unless it is, in some way, expressly provided for.

The circuit court has no larger power in regard to interest upon claims which are sued for under this statute than has the Court of Claims.

An item of $100, for making and filing a report, under sect. 798, at the Sept. term, 1888, of circuit court, was disallowed, but is now allowed under the ordinary custom in regard to such reports.

7. The Treasury Department disallows a fee of fifteen cents upon commissioner's orders, fixing bail, holding to bail, and discharging bail upon the ground that the commissioner's court is not a court of record.

There are a number of decisions by Federal judges that courts of justices of the peace, in their respective States, and commissioner's courts therein, are not courts of record and are not authorized to take acknowledgment of recognizances for future appearance of the accused (Strong v. U. S., 34 Fed. Rep., 17), but that bail for the appearance in the trial court should be by bond, a recognizance being a contract of record and a part of the records of the court. (U. S. v. Ambrose, 7 Fed. Rep., 554.)

All these decisions are based upon U. S. v. Rundlett (2 Curtis, C. C., 41), in which Mr. Justice Curtis held that it was the intention of Congress, in the section of the act in regard to the powers of commissioners, now known as sect. 1014 of the Revised Statutes, "to assimilate all the pro-

ceedings for holding accused persons to answer before a court of the U. S. to the proceedings held for similar purposes by the laws of the State where the proceedings should take place, and as a necessary consequence,
37 that the commissioners have power to order a recognizance to be given, to appear before them, in those States where justices of the peace or other examining magistrates have such power," and if the magistrate in the State has no such power, the commissioner in such State can not take a recognizance for appearance at a future day before him. Judge Woodruff, in U. S. v. Case (8 Blatch. C. C. R., 250), concurred in this construction, saying "that in a State where the justice of the peace has power to take a recognizance to appear from day to day, pending the examination of the accused, then a U. S. commissioner has such power." If the State magistrate has not such power, a commissioner can only take bail for appearance at the proper court to answer there for the offense charged.

How the bail should be taken, whether by hand or recognizance, was not stated.

In Connecticut a bond or recognizance for appearance before a justice of the peace from day to day can be taken by the magistrate pending the examination. (Potter v. Kingsbury, 4 Day, 98.) Courts of justices of the peace are courts of record (Davidson v. Murphy, 13 Conn., 213), and it is the constant practice for justices of the peace to take recognizances. The fees which are charged are proper in this district and are allowed.

In this connection items 10 and 11 may properly be considered. Item 10 relates to acknowledgments of the principal in a recognizance, which are objected to because only one acknowledgment of the bond is necessary, and, latterly, a fee for any acknowledgment is objected to upon the ground that an acknowledgment of a written bond is unnecessary and adds
38 nothing to its validity, which is true. But the recognizances which are taken by commissioners in this district and other districts where similiar statutes exist are not written bonds, but are obligations entered into before the court, and into which each party, both principal and surety, enters by a separate acknowlegment.

No. 11 relates to fees for copies or transcripts of records returned by the commissioner to the clerk's office. The Auditor allows, in each case, the sum of sixty cents, as ample to furnish a record of the proceedings or for a copy of the "process." The statute provides that "copies of the process shall be returned" to the clerk's office, and the Auditor construes this to be a copy merely of the warrant, or perhaps the complaint and warrant. The commissioner makes a copy of the record. If "process" in section 1014 is properly construed to mean simply the papers upon which the accused was arrested, the position of the Auditor is correct. But it was expressly held in U. S. v. Rundlett, supra, that "mode of process" in this section means mode of proceeding, and that the nonappearance of the principal in the recognizance in answer to a call was to be proved by an entry on the minutes of the magistrate and returned to him as part of the proceedings.

The word "process," in like manner, does not mean simply the warrant, but is used in the larger sence of proceedings. The petitioner has followed the uniform course of justices of the peace in this State, who are required by statute to transmit to specified officers of the State court copies of the files and records in "binding over" criminal cases before them.

An examination of all the records named in the petition and
39 amendments shows that $16.80 should be allowed and paid in excess of the sum allowed by the Auditor.

8. The next subject is the much-disputed question of a commissioner's right to docket fees under the deficiency appropriation bill of August 4, 1886 (24 St., 274), which appropriated a sum of money for the payment of commissioners, "provided that for issuing any warrant or writ and for any other necessary service commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees." Upon the question whether this provision applied merely to that appropriation or was a continuing statute, and was intended to limit the breadth of section 847 as construed by the Supreme Court in U. S. v. Wallace (116 U. S., 398), the courts have been much divided. Bell v. U. S. (35 Fed. Rep., 889), Rand v. U. S. (36 Fed. Rep., 671), Hoyne v. U. S. (38 Fed. Rep., 542), and McDermott v. U. S. (40 Fed. Rep., 217) are authorities to the effect that the provision applied merely to that appropriation. Strong v. U. S. (34 Fed. Rep., 17), Calvert v. U. S. (37 Fed. Rep., 762), McKinstry v. U. S. (40 Fed. Rep., 813), Crawford v. U. S. (Ibid., 446), Goodrich v. U. S. (42 Fed. Rep., 392) are contra. Notwithstanding the clause is in a deficiency bill and is a proviso, I think that the history of the legislation and the positive character of the language, which, repeating the phraseology of the disputed clause of sect. 847, adds the declaration, "they shall not be entitled to any docket fees," show the legislative intent that docket fees should not thereafter be included within that section.

In other words, the reasoning of Judges Toulmin and Pardee, with which Mr. Justice Lamar concurs, seems to me the more forcible
40 and convincing. The item is not allowed.

9. The Department declines to allow for a mittimus by the commissioners upon the first continuance, upon the ground that sect. 1030 provides that no writ is necessary for remanding the prisoner from the court into custody.

This is applicable where the accused is already in custody by virtue of a warrant from the court. The first warrant of the commissioner is simply to arrest and bring before him, and when it is executed it has spent its force. A commitment to jail becomes necessary if the prisoner is to be held. (Ex parte Morrill, 35 Fed. Rep., 261; Hayward v. U. S., 37 Fed. Rep. 764.)

In this district the copy which is required by sect. 1028 to be left with the jailor is made and certified by the commissioner. The fees for the warrant or mittimus, filing the same upon its return, entering the return, the copy, and the certificate are $1.80.

12. Fees for five subpœnas were deducted on the ground that they were excessive. The clerk testifies that he never issued a subpœna unless it was called for by the district attorney. I have no reason to suppose that unnecessary papers of this kind are called for or are issued.

13. The clerk charges for reports to the depositary, Secretary of the Treasury, and Commissioner of Internal Revenue of the cases in which monies are paid to the clerk at fifteen cents per folio. These reports are in the nature of letters to the different officials, transmitting the
41 receipts of the depositary for these monies and stating the case and its nature. I think that the term reports is not applicable to them

and that the commissions were intended to cover the services incident to the deposit of the money and the transmission of the information to the Department. This item is disallowed.

14. Small deductions of $1.90 were made for claimed errors in addition, etc., as stated in the 14th claim. The amount should not have been deducted.

15. The clerk charges for recording in a book for that purpose the names and residences of the jurors who were annually elected and whose names were put in the boxes. This was not done by order of court, but was a thing very proper and necessary to be done for the orderly management of the business. A list or a record should be kept, so that the names upon the separate slips can be easily ascertained and verified, and that the names of those who have been drawn or who have died or have removed may be checked. This was a part of the business of the jury commissioners and not of the clerk as clerk. This item is not allowed.

42 16. The charges by the plaintiff as U. S. commissioner of $2.20 for affidavit, oath, filing, and the warrant in the case of an accused person who was not arrested, having left the State for another country, are allowed.

The charges of $1.30 as clerk for entering motion to reduce a bond and denial of the same, also of fees for mittimus in Massacotte's case, and for entering motions and orders appointing guardians ad litem of minors, are allowed. The items in regard to entering motions for and orders of leave to file pleas of nolo contendere and for entering payment of fines and costs are withdrawn.

17. The next item, consisting of charges for copies of bills of cost furnished by the clerk in compromised internal revenue cases, as follows: For copy of costs furnished district attorney in these cases before judgment, 10 cents; a certified copy furnished, after judgment, by direction of the Internal Revenue Commissioner, 25 cents. In compromised internal revenue cases the Department requires these copies, and the copy, after judgment, is required to be a certified copy. The fees are included in the expenses to be paid and are paid to the Government by the defendant. The item is allowed.

The amount due to the plaintiff is $1,279.12, for which sum let judgment be entered, with costs.

EDWIN E. MARVIN, *pro se.*

GEO. G. SILL, *Dist. Attorney for the U. S.*

43 And on the same day the plaintiff appeared and moved for judgment, and the United States, by its attorney, George G. Sill, esq., also appeared.

Whereupon it is considered by the court that the issue is for the plaintiff, and it is ordered, adjudged, and decreed that the plaintiff do recover of the defendant the sum of $1,279.12 and his costs of suit, taxed at $.

A true record.

Attest:

E. E. MARVIN,
Clerk.

I, Edwin E. Marvin, clerk of the United States circuit court in and for the district of Connecticut, do certify that the foregoing is a correct transcript of the pleadings, proceedings, findings of fact, conclusions of law, and record of judgment remaining of record in said court in the above entitled case.

In testimony whereof I have set hereto my hand and the seal of said court at Hartford, in said district, this 24th day of February, A. D. 1891.

EDWIN E. MARVIN,
Clerk.

(Indorsed on cover:) No. 667. The United States, appellant, vs. Edwin E. Marvin. Connecticut C. C. U. S. Filed March 5th, 1891.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
EDWIN E. MARVIN, APPELLEE.
} NO. 667.

Appeal from the Circuit Court of the United States for the District of Connecticut.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.

MITCHELL, PRINTER.

IN THE

Supreme Court of the United States.

October Term, 1892.

THE UNITED STATES, APPELLANT,
vs.
EDWIN E. MARVIN, APPELLEE. } No. 667.

Appeal from the Circuit Court of the United States for the District of Connecticut.

FEES OF CLERK AND COMMISSIONER.

It is contended on behalf of appellee that all the items of charges included in the judgment of the court below are clearly authorized by the provisions of sections 828 and 847, Revised Statutes of the United States.

Upon the findings of the court below all the charges included in the judgment were allowed by this Court in the Ewing and Barber cases, 140 U. S., 143, 164, and the Van Duzee case, 140 U. S., 169, 199, with the following exceptions:

Item 2. The charge for per diems, hearing and deciding as commissioner on days when per diems were allowed for attendance on court as clerk, is fully sustained on the authority of Erwin *vs.* U. S., 37 Fed. Rep., 470, and U. S. *vs.* Saunders, 120 U. S., 126.

Item 2. R., pp. 13, 15. Per diems for services as jury commissioner under the act of June 30, 1879 (21 Stat., 43), are claimed on the authority of Erwin *vs.* U. S., *supra*, Goodrich *vs.* U. S., 42 Fed. Rep., 392.

The approval of the Court is conclusive in the absence of clear and unequivocal proof of mistake. U. S. *vs.* Jones, 134 U. S., 483.

It is submitted that the appellant has failed to show any mistake in the approval of the Court, and that the judgment of the court below should be affirmed.

CHARLES C. LANCASTER,
Counsel for Appellee.

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Office Supreme Court U. S.
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CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. .....

EX PARTE CHRISTIAN VAN GUNDEN ET AL.,
PETITIONERS.

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals for the Fourth Circuit to certify to the Supreme Court for its revision and determination the case of Christian Van Gunden and Others against The Virginia Coal and Iron Co. (being No. 5 on the Docket of said Court).

FILED IN THE OFFICE OF THE CLERK OF THE SUPREME COURT OF THE UNITED STATES, AT WASHINGTON, D. C., THIS 12TH DAY OF NOVEMBER, A. D. 1892.

WILLIAM C. MAYNE, Philadelphia,
DAN'L H. CHAMBERLAIN, New York,
F. S. BLAIR and J. J. A. POWELL,
Wytheville, Virginia,
Attorneys and Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

In Re CHRISTIAN VAN GUNDEN and Others, Petitioners.

Notice of application to the Supreme Court of the United States for a writ of certiorari to United States circuit court of appeals for the fourth circuit for review of the case of Christian Van Gunden and others, plaintiffs in error, *vs.* The Virginia Coal and Iron Company, defendants in error.

To The Virginia Coal and Iron Company, defendants in error, and to Richard C. Dale, Esq., of counsel:

Notice is here given that the above-named petitioners will, on Monday, the 21st day of November, A. D. 1892, at 12 o'clock, noon, of said day, or as soon thereafter as counsel can be heard, apply to the honorable Supreme Court of the United States for a writ of certiorari to be issued to the United States circuit court of appeals for the fourth circuit for the purpose of reviewing the cause therein entitled Christian Van Gunden, Edwin F. Partridge, Frank Brenton, John Flanigan, and Charles F. Foster, plaintiffs in error, *vs.* The Virginia Coal and Iron Company, defendants in error.

This application will be based upon the petition, a copy of which is hereunto annexed, and on a certified copy of the record of said cause attached to the original petition; which said certified copy of the record is marked Exhibit "A," and which is now lodged in the office of the clerk of the Supreme Court of the United States.

Washington, D. C., November 11th, 1892.

WILLIAM C. MAYNE,
Of Counsel for Petitioners.

Service of above notice and a copy of said petition accepted.
Philadelphia, November, 1892.

RICHARD C. DALE,
Of Counsel for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1892.

Ex Parte CHRISTIAN VAN GUNDEN, EDWIN F. PARTRIDGE, FRANK BRENTON, JOHN FLANIGAN, and CHARLES F. FOSTER, Plaintiffs in Error, Petitioners.

Petition for writ of certiorari requiring the circuit court of appeals for the fourth circuit to certify to the Supreme Court for its revision and determination the case of Christian Van Gunden and others against The Virginia Coal and Iron Company (being No. 5 on the docket of said court).

To the honorable the Supreme Court of the United States:

The petition of Christian Van Gunden, Frank Brenton, Edwin F. Partridge, citizens and residents of the State of Pennsylvania, and Chas. N. Foster, citizen and resident of the State of Connecticut, who claim an undivided third part of a very valuable tract of land situate in the county of Wise, State of Virginia, and which is the subject of this suit, would respectfully represent to the court:

1.

That the property in controversy is of great value, involving the title to 48,200 acres of land situate in Wise county, Virginia, on which are found very large bodies of the most excellent coal, upon which an estimate of two millions of dollars value was placed by the counsel for the defendant in this cause in their argument thereof, but ninety-five per cent. of which said lands, as shown by the testimony of two of the court's surveyors in this cause, to wit, Wolfe and Tate, is still in a state of nature, without any occupancy or enclosure of any kind, and the value of which said property will still be greater enhanced by the development thereof until its value will become immensely great.

The value of this property may be somewhat appreciated when it is stated that from similar lands near by coal of the value of eighteen hundred dollars per acre is now being mined.

2.

That this was an action of ejectment in the circuit court of the United States for the western district of Virginia, at Abingdon, and at the time of the rendition of the judgment the act of Congress establishing the United States circuit court of appeals had but recently been passed, and that court in this circuit been but recently organized, while the rules of that court had not been promulgated, and in consequence of this state of affairs there was not only a great

diversity of opinion as to the method of taking appeals, but also as to the proper tribunal to which cases should be carried from the said circuit court of the United States, this cause being as early as No. 5 on said docket of said circuit court of appeals. Even upon the jurisdictional question as to whether this case should go by writ of error directly to the Supreme Court of the United States or to said United States circuit court of appeals the opinions of both judges and lawyers were very conflicting. The trouble that confronted your petitioners in the case was that from the construction then placed by the profession on the Evarts act if the writ of error went directly to the Supreme Court of the United States its adjudication would be limited to the mere constitutional questions involved, and the petitioners would thus be deprived of all consideration of the merits of this most important controversy; while, on the other hand, if the writ of error was to the circuit court of appeals of the United States, while they could get an adjudication of the merits on their case there, such decision would be final in that court unless the jurisdiction of the Supreme Court of the United States was invoked upon the naked constitutional questions involved; but the learned author of the act establishing the said court of appeals had very wisely provided a remedy in analogy to an appeal, to wit, by certiorari, by which the whole matter of controversy may be brought before your honorable court.

If, therefore, any injustice has resulted to your petitioners in the trial of this case by reason of the confusion and uncertainty of procedure incident to the organization of a new intermediate court in this circuit, whose jurisdiction was not defined by judicial construction and the rules of which court were not accessible to the profession, your petitioners do not doubt but that your honorable court will now, by the writ of certiorari named, grant them a review of this case, and especially will this be so in view of large values of the property and of grave and important questions involved in the construction of the constitution and application of the forfeiture and tax laws of the State of Virginia.

3.

That further reasons for the interposition of your honorable court by certiorari in this case will be found in the fact that it will be in the interest of jurisprudence and uniformity of decision, and will tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters; for we suggest with great respect to the learned appellate court below, whose opinion is now sought to be reviewed, that it has fallen into great confusion and hurtful error, arising, no doubt, from the immense volume of the case, it consisting of over 650 pages of printed matter; which confusion of ideas and errors of both law and facts will be pointed out during the further progress of this petition.

4.

That there is involved in this controversy the grave constitutional question as to whether the property of the non-resident citizen can be divested by the forfeiture acts of Virginia, which adjudge rights and property to be forfeited by mere legislative enactments, "without a judicial hearing and without any notice and due process of law," and your petitioners are advised that the direct question presented by the forfeiture acts of Virginia has never been determined by your honorable court; and the further interesting constitutional question is presented as to the constitutionality of an act of the legislature of Virginia which makes the tax deed and proceedings for sale of delinquent lands conclusive upon their face "notwithstanding any irregularities in the proceedings under which grantee claims title, unless such irregularity appears on the face of the proceedings;" and the not less important question as to whether an innocent non-resident purchaser for valuable consideration without notice and under a valid deed can be divested of his title and ownership by an outstanding adverse deed that has never been recorded, under the register acts of Virginia, in the county in which the land is situate, but by the recordation of a mere copy of a deed from another State, improperly admitted to record in another county of the State of Virginia in which the land was not situate.

5.

That another grave error into which the honorable court fell and which has been very hurtful to your petitioners is this: That under a tax deed to one Olinger, which on the face of the deed itself gave notice to the purchasers that he was only taking by his deed the one-third of the 48,200 acres of land, and which was also limited to that one-third interest by the very language of the tax act itself, the honorable court construed this tax deed, with this notice to the tax purchaser which was inherent in it, to be color of title not only against the cotenant whose interest was sold, but also was to be color of title as to the other two cotenants whose interests the deed made manifest to the tax purchaser did not pass thereby.

6.

That these facts and rulings of the circuit court and the opinion of the circuit court of appeals to sustain the averments set forth in this petition will be seen from a copy of the entire record, herewith filed as a part of this application in conformity with rule 37 of this honorable court relative to cases from the circuit court of appeals, and marked Exhibit "A."

That this was an action of ejectment brought in the circuit court of the United States for the western district of Virginia, at Abingdon, by Christian Van Gunden and others against the Virginia Coal and Iron Company.

It was for the recovery of one-third of about 48,200 acres of land, a portion of a patent issued to Nathan Field, Nathaniel Taylor, and John Johnston, dated 30th day of January, 1796, by the Commonwealth of Virginia, and then situated in Lee, but at the time of the purchase by the petitioners, in 1888, in Wise county, Virginia (a new county), organized in 1858 from Lee county.

The plaintiffs claim as innocent purchasers for value of said land from Nathan Feld's heirs.

Nathan Field died intestate, at his home in Philadelphia, July 20th, 1820, seized and entitled to an undivided one-third in said land as joint tenant with said Taylor and Johnston.

This suit only concerns the undivided one-third interest of Nathan Field, purchaser for value without notice of any adverse title.

The defendant, The Virginia Coal and Iron Company, claims under a tax deed derived by John C. Olinger at a tax sale of Nathaniel Taylor's interest made October, 1834, which resulted in a deed to him from Mills, clerk, in 1836, the said Olinger conveying to intermediate parties, who conveyed to the defendant company the interest purchased by said Olinger at said tax sale, each of said intermediate parties having notice that said tax deed conveyed to them only the one-third interest of Taylor. (See deed from Olinger to Kane, page 233 *f* and *g*, to which deed the attention of this court is called as notifying the purchaser that the title conveyed was defective.)

1. That the contention by the defendant was that the said land had been forfeited to the Commonwealth of Virginia in 1816 and again 1831.

2. That the said Field had conveyed his interest to his joint tenant, Taylor, by deed dated January 1, 1796, and registered in Carter county, Tennessee, in the year 1816, and a copy from the records of Carter county, Tennessee, has been recorded in Scott county, Virginia, where the lands were not situate.

3. That the defendant claims adverse possession against plaintiffs in this suit by reason of the tax deed which it claimed gave color of title to all the land in controversy. On trial of the case there was a verdict and judgment for the defendant in the court below and a writ of error to the United States circuit court of appeals for the fourth circuit, and it was decided in Richmond, Virginia, on the 12th day of October, 1892, before Bond and Goff, circuit judges, and Morriss, district judge, with an affirmance of the judgment of the court below for reasons in writing filed with the case by Judge Goff and hereinafter referred to as the opinion of the appellate court.

7.

That the defendants relied upon a certificate of the auditor of public accounts of Virginia, found on page 548 of the printed record, by which it was claimed that the said lands standing in the name of the said Field, Taylor, and Johnston as 62,000 acres were delinquent from 1798 to 1801, inclusive, and from 1812 to 1816, inclusive, and that the taxes and damages due in 1816 were $349.82.

The next evidence of said forfeiture is a certificate, found on page 549 of said record, which is a mere recital that among the list of lands returned as delinquent in Lee county, Virginia, from 1821 to 1831, inclusive, and on which taxes had not been paid, was a tract of land containing 62,000 acres, returned delinquent for the taxes of the years from 1821 to 1831, and that the taxes for each of said years were fifty cents, except the year 1821, which was fifty-six cents, and the total amount of taxes aggregated $5.62; and the following memorandum, and which was supposed to be the height of the proof of the fact of forfeiture, was made by somebody opposite the entry of this tract, without signature or date and wholly extra-official, so far as any requirement of the statute shows: "This tract vested in the literary fund in 1816 and is now redeemable; tax and damages, $349.82, to be added to those here charged."

This was all of the evidence of forfeiture in 1816 claimed by the defendants or offered in evidence by them, and it will be seen that these certificates are mere statements by the auditor of public accounts of the facts of delinquency and forfeiture, and that there was no record introduced of any proceeding or inquest of forfeiture in which there was any notice to the owners of the said land.

It will be seen from an inspection of this certificate, which fixes the taxes for each year at fifty cents, except one year at fifty-six cents, that it is a mathematical impossibility for the aggregate of said taxes to have reached the sum of $349.82 for the years 1898 to 1801 and 1812 to 1816, and to reach the minimum amount of $10.00, for which the forfeiture could even occur under these unconstitutional acts.

Upon the behalf of the plaintiffs and in rebuttal of the two certificates named the plaintiffs introduced in evidence a certificate from the clerk of the county court of Lee county, Virginia, with an abstract from the land books from that county embracing the period, which showed that down to and including the year 1832 the said lands had never been forfeited, as claimed by the defendant, and said certificate of the clerk of the said county of Lee, being the original office to which the return was made and from which the auditor's copy was sent to him, showed no memorandum of forfeiture, and thus directly contradicted the said auditor's certificate relied on by the defendant (see page 188 of the printed record) for this rebuttal evidence of the plaintiffs, and by a clerical omission the said certificate of the said clerk of Lee county, while referred to in the printed record as having been introduced, was wholly omitted therefrom, and the honorable circuit court of appeals were thus deprived of the benefit of this most invaluable piece of testimony. The forfeiture of 1816 was claimed to have resulted from the act of Virginia of February 9, 1814, sec. 30, chapter 3, from acts 1813–'14.

8.

The next forfeiture, as already stated, that was insisted on by the defendant was that of 1831, under the tax act of Virginia of April 1, 1831, found in Virginia Acts 1830–'31, chapter 28, section 1.

9.

That the certificates of the auditor offered by the defendant in evidence of forfeiture were strenuously resisted by the plaintiffs upon many grounds and especially upon the ground that they contained a mere certified statement of the auditor instead of certified abstracts from the auditor's public records.

The plaintiffs contended that the auditor's certificates presented by the defendant were mere matters of opinion and statements of facts, and that he should have certified the abstracts themselves from the books and not substitute his opinion, as embodied in his certificate, for the real facts of the case.

The plaintiffs, with the view of combating the said theory of forfeiture sought to be raised by said defendant by said certificates, asked the court to give to the jury instructions Nos. 4 and 5, but the court refused to give to the jury said instruction No. 4, and it was not given, and refused to give instruction No. 5, but struck out therefrom, in lines Nos. 9 and 10 of the instruction, the words "and all other facts and circumstances of the case," and gave the instruction in this modified form; but the court did give, on the motion of the defendant, instructions Nos. 3 and 6, the effect of which rulings of the court was to say to the jury that if they believed the said certificates to be true, then under the tax laws of the State the said land was forfeited both in the years 1816 and 1831. (The plaintiffs' instruction named will be found on pages 635 and 636 and the defendant's instructions named will be found on pages 641 and 642 of the printed record.)

Proper bills of exception were taken by petitioners to the said ruling of the court, as will be seen from pages 634 and 640 of the printed record, and the said action of the court was made the subject of assignment of errors, as will be seen from page 653, in assignments Nos. 9, 10, 11, 17, 18, 23, and 26 of the printed record.

10.

That upon decision of this case in said circuit court of appeals the honorable court sustained the rulings of the said circuit court in the following manner, as appears by the decision, on page eleven of the opinion hereto annexed (see Exhibit "A").

It is proper to state here that by typographical errors in the reprinted record the forfeiture to the literary fund of Virginia for the non-payment of taxes was stated in instruction No. 4 for plaintiffs (see page 635) to be for the year 1834 instead of the year 1832, under the act of assembly for the year 1831. The amount for which taxes were released by said typographical error were stated to be for taxes not exceeding the sum of $20.00, whilst it should have been for taxes not exceeding the sum of $10.00. The learned appellate court fell into this same error by reason of the said typographical misprint, but the said court sustained the ruling of the court below in refusing to give said instruction No. 4 as asked for by the plain-

tiffs. On pages 12, 13, and 14 of the opinion of the circuit court of appeals the action of the court below was sustained in giving the plaintiffs' instructions, from which were stricken out the words "and all other facts and circumstances of the case," but on pages 14 and 15 of said opinion the appellate court in effect sustained an unqualified instruction to the jury that the said land was forfeited to the Commonwealth of Virginia if they believed the certificates of the said auditor along with the said certificates from the county of Lee; hence the action of the court was tantamount to saying to the jury that under the forfeiture laws of Virginia the certificates of the auditor made out a case of forfeiture of the land in controversy and was conclusive evidence of that fact. Thus the honorable court was only following an illegal act of the Virginia legislature, to wit, said act of April 1st, 1831, section 7, which directs that the said auditor's certificates shall be evidence of such forfeiture.

On pages 17 and 18 of said opinion the honorable appellate court repeats the said error by holding that the forfeiture of the land was made out under the law by force of the auditor's certificate and merely by the proof of the facts stated in them.

That the constitutional point as to the validity of the forfeiture act of Virginia named is sharply made on page 18 of said opinion by said appellate court, where the following language therefor is used: "Plaintiffs in error insist that the State of Virginia had not the right to forfeit to its own use the land situated in that State and owned by citizens of that and other States, and that the State of Virginia could not vest title to said land in itself without some antecedent procedure which would be equivalent to a judicial ascertainment of the facts which are made occasion of the forfeiture. The supreme court of Virginia has, in a number of cases, virtually disposed of this question, and the decisions of that court relative to the 'forfeiture acts' passed by the legislature of that State will be accepted as conclusive evidence of that point by this court.

11.

That your petitioners insist that the decisions of the Virginia courts, relied upon by the honorable circuit court of appeals named, sustaining the said forfeiture acts and the divestiture of title and ownership of land without some antecedent procedure equivalent to judicial ascertainment of the facts which make the occasion of the forfeiture, and most especially to the non-resident owners, are in direct contravention of the Constitution of the United States, which is but a transcript of the 29th chapter of Magna Charta, and the decisions thereunder, which provide that the property of no citizen can be taken without process of warrant, and there can be no sale of such property without notification to the owner, in order to enforce the penalty against them.

That the said Virginia statutes are anomalous, in that the forfeiture acts heretofore referred to in themselves, of their own force, and by their own energy, work out their own purpose and assume to

effectually divest the title out of the owner and to perfectly vest it in the Commonwealth, our alleged purchaser, without the machinery of any record or anything in the nature of an inquest of office. In other words, those forfeiture laws themselves *proprio vigore*, consummate and perfect the forfeiture.

Now, it is submitted, however, in this connection that the opinion of the learned circuit court of appeals mentioned in this case, found on page 18, *ante*, in said printed opinion, is in conflict with a very recent and well-matured decision of the supreme court of Virginia, whose opinion, it is said, on page 18 is accepted as conclusive on that point. We refer to the case of Boggs *vs.* Commonwealth, 76 Virginia Reports, on page 989, citing and founded upon McVeigh *vs.* United States, 11 Wall., page 267.

12.

That by reference to each of the said tax acts of 1814 and 1831, secs. 24, 25, and 26, it will be seen that the only notice prescribed for the owner is the posting of the tax-list at the front door of the court-house once a week for two months preceding the sale, and "the publication in some newspaper printed in the city of Richmond." It is submitted that such advertisement on the door of an obscure court-house, or even such publication in some newspaper, does not meet the constitutional requirements of "due process of law" within the meaning of the terms as the Constitution employs them, and especially is this so when applied to a case of a non-resident, as was the case here, for all of the plaintiffs were outside of and far remote from Virginia.

13.

That in connection with this point we now advert to the constitutional bearing of the action of the circuit court in its instructions to the jury Nos. 4, 6, and 9, being the subjects of the assignment of errors Nos. 24, 26, and 29, which were considered together by the said appellate court on pages 18, 19, and 20 of the printed opinion. This action of the court in effect made the said tax deed conclusive evidence of the recitals contained therein, and the court was influenced thereto by the 26th section of chapter 38 of the Code of Virginia of 1873, which is carried into the new Code of Virginia of 1887 as section 661. By this section the legislature of Virginia provides that the effect of a tax deed shall be to vest in the grantee of said deed the entire estate that was vested in the person assessed with the taxes and on account whereof the sale was made; and the act provides that the conclusive effect of said tax deed shall prevail, "notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appear on the face of the proceedings." That is to say, that the legislature of Vir-

vinia by said act has not made said tax deed merely *prima facie* evidence of the recitals therein, but has imparted to said tax deed the effect of being conclusive proof of the recitals in said deed and proceedings unless such irregularity appears on the face of the proceedings. The tax officers might connive to rob the citizen of his property, a fraudulent conveyance might be made, or dishonest records of tax sales and proceedings might be collusively manufactured, and yet, under this Virginia act, the owner is precluded from showing the fraud or wrong, except in the instance that the record should appear irregular on its face. The constitutional objection to this act is that the legislature has declared the weight of evidence that such deed is entitled to, and thus has prevented the owner from having his controversy determined by the rules of evidence that existed at the time his right vested, and also, under pretense of regulating the presentation of evidence, goes so far as to preclude the owner on the trial from showing its invalidity. The appellate court on said pages named, 18, 19, 20, and 21 of the printed opinion, adjudged that said tax deed, without more, did constitute color of title under which the grantee therein could claim the entire tract of land described in the deed, and that the effect of such tax deed was to convey title to said grantee to the entire tract for the taxes of which the land was sold, but at the same time the learned appellate court, on page 20, in direct conflict with its rulings just named, made the admission "that by the act of March 10, 1832, under which it is claimed the land was sold in the name of Taylor's heirs, that Olinger, the purchaser, by the deed made to him by Mills, the clerk, acquired legal title to such interest only as Taylor's heirs had in the land at the time of the sale." This admission is strangely irreconcilable with the adjudication by that honorable appellate court that the entire tract of land might pass by the deed, and that a jury would so find. We respectfully submit that the learned appellate court in effect told the jury to find that a deed that only conveyed the interests of Taylor and recited that fact in the deed by their verdict might find that the deed conveyed all the interests of all the patentees; and on page 21 of the printed opinion the said appellate court says:

"We think it clear that the deed to Olinger gave him color of title to all the land described in it." This ruling of the court is not only in conflict with the recital of the deed which gave notice to the tax purchaser that he was only purchasing the Taylor interest, but it is in direct conflict with the plain language of the tax act that was admitted by the honorable appellate court on page 20 of the printed opinion to limit the conveyance to the interest only of the Taylor heirs, and which was the only semblance of authority for making the deed at all. The supreme court of Virginia, by unanimous bench, in construing the effect of such a tax deed, have expressly limited such tax deed to a conveyance only of the interest of the party assessed with the taxes and on whose account the sale was made, which in this case was Taylor's interest. (See Gates and Clark *vs.* Lawson *et als.*, 32d Gratt. (Va.), page 15.)

14.

As the honorable circuit court by its instruction No. 10 (page 644 of printed record) told the jury that there was evidence in the case from which the jury might find that Fields, the patentee, did sell his interest in the land in controversy to his copatentee, Taylor, by a deed dated January 30, 1796, and in instructions Nos. 2 and 3 (page 634 and 635 of printed record) the said court required plaintiffs to insert therein that the jury should find as directed unless they should find that the interest of Fields therein had been sold to Taylor, meaning by the said deed; it is respectfully submitted that the said Taylor deed was not admissible to the jury for any purpose. And the learned appellate court on page 9 says: "This deed, though proven, as the record shows, was not presented for record within the time allowed, *nor in the proper county* (italics ours), and consequently cannot be used as evidence tending to prove constructive notice to third persons. It was not admitted in evidence for that purpose, nor as a copy of a recorded deed, in the sense such copies are generally used." It is pertinent to inquire, then, if said deed was not evidence tending to prove constructive notice to third persons, and had not been presented for record within the time allowed by law, nor in the proper county, to wit, in which the land was situate, as admitted by the appellate court on page 9, for what possible purpose could said deed have been admitted? As repeatedly stated herein, the plaintiffs, Van Gunden and others, were purchasers of the Fields interest, for value, by deed, without any notice whatever of the alleged deed of Fields to Taylor. The reasons given by your honorable appellate court are wholly unsatisfactory, and, in effect, repeal the register acts of the State, in so far as notice to purchasers is contemplated by that act, because, on page 10 of the printed opinion, the learned appellate court wholly loses sight of the fact that it is a controversy between innocent purchasers upon one hand and the defendant upon the other hand, claiming title under an admitted improperly recorded deed, and the said appellate court very erroneously treated the said deed as the original deed that has been lost, and therefore binding between the original parties thereto; and after deciding that there was sufficient testimony tending to show that the deed did exist, and was lost, did in effect make it notice to the plaintiffs, and did thereby defeat their recovery in said action of ejectment by saying to the jury in the said 10th instruction (page 644) that there was evidence sufficient for which the jury might find that Fields did sell his interest in the lands to Taylor, and in this way virtually told the jury that, such fact being true, they could find for the defendant, and thus permitted, in violation of the plain language of the register law of the State, a copy of a copy of an unrecorded deed to defeat the plaintiffs' recovery in said action, while, in the same breath, the honorable appellate court had said that such unrecorded deed was not even constructive notice to the plaintiffs, who are third parties. This hurtful error, both of the court below and of the appellate

court, in treating said unrecorded deed as notice to the plaintiffs, pervades not only the 10th instruction (page 644) asked for by the defendant, but, by modification of plaintiffs' instructions Nos. 2 and 3 (pages 634 and 635), it was again impressed on the jury that whatever title or right the plaintiffs might possess, those rights were defeated if the jury simply believe that Fields had conveyed to Taylor his interest in said land by a deed recorded in the State of Tennessee, and no copy of which has up to this day ever been recorded in the county of Wise, where the lands are now situate, nor was ever recorded in the county of Lee, when the land was situate in that county.

15.

That thus by reason of the unrecorded deed as notice to plaintiffs, and especially by reason of the prejudicial effects of the two unconstitutional acts heretofore referred to of the Virginia legislature, the petitioners were defeated in their recovery in this case; for, by the unconstitutional forfeiture and tax act of Virginia the said tax sale of the Taylor interest, that has been made to operate as a divestiture of all the lands, was without that "due process of law" that is required before the title of the owner could be legally divested; and again by the other unconstitutional act absolute verity and conclusiveness was attached to the tax deed and its recitals, and thus a mere tax deed, emanating from tax proceedings was not only made to prove itself, but, in violation of the Constitution of the United States, the legislature had been permitted to make the said tax deed conclusive evidence of a complete title, which amounts to an unconstitutional confiscation of the property of the plaintiff by precluding the owner of the original title from showing its invalidity and thus depriving him of the constitutional rights that all parties litigant are entitled to enjoy before the courts of the country in judicial litigation. Your petitioners therefore respectfully submit that the questions, involving legal and just construction and application of the Constitution, as respects these grave questions of forfeiture and the conclusiveness of the tax deed and proceedings which are herein involved and presented by your petitioner, shall be authoritatively and finally adjudged by this honorable court, upon and after a full presentation to the court on the merits of the said question on the part of the petitioner, in the interest of jurisprudence and uniformity of decision, so as to avert diversity of judgment and thus guard against inadvertency of conclusion in controversies involving such weighty and serious matters.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings from said court of appeals in said case therein, entitled Christian Van Gunden and others *versus* the Virginia Coal and Iron Company, in error, No. 5, to the

end that the said case may be reviewed and determined by this court, as provided by section 6 of the act of Congress approved March 3rd, 1891, by which "power is given to this court to require a case in which the judgment or decree of the circuit court of appeals is made final to be certified here for review and determination as if it had been brought here on appeal or writ of error;" or that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said circuit court of appeals in the said case and every part thereof may be reversed by this honorable court.

And your petitioners will ever pray, &c.

CHRISTIAN VAN GUNDEN & OTHERS,
By counsel, J. J. A. POWELL,
Of Counsel for Petitioners.

WILLIAM C. MAYNE,
D. H. CHAMBERLAINE,
F. S. BLAIR,
J. J. A. POWELL,
Attorneys and Counsel for Petitioners.

UNITED STATES OF AMERICA:

VIRGINIA, *Wythe County,* } *To wit:*

This day personally appeared before me, Samuel Walter, a United States commissioner for the western district of Virginia, in the said county, J. J. A. Powell, who made oath in due form of law that he was one of the attorneys and of counsel for petitioners, who are plaintiffs in the court below, and as such he had personal charge of the case for them in the foregoing petition mentioned in the circuit court of the United States for the western district of Virginia and in the United States circuit court of appeals for the fourth circuit, and that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

J. J. A. POWELL,

Sworn to and subscribed before me this 5th day of November, 1892.

SAM'L WALTER,
U. S. Commissioner for Western District of Virginia,
Wytheville, Va.

(Endorsed on cover:) In the Supreme Court of the United States, October term, 1892. No. —. *Ex parte* Christian Van Gunden, Edwin F. Partridge, Frank Brenton, John Flanigan, and Charles F.

Foster, plaintiffs in error, petitioners. Petition for writ of certiorari to the circuit court of appeals for the fourth circuit to certify to the Supreme Court for its revision and determination the case of Christian Van Gunden and Others against The Virginia Coal and Iron Co. (being No. 5 on the docket of said court).

Filed in the office of the clerk of the Supreme Court of the United States, at Washington, D. C., this — day of November, A. D. 1892. William C. Mayne, Philadelphia; Dan'l H. Chamberlaine, New York; F. S. Blair and J. J. A. Powell, Wytheville, Virginia, attorneys and counsel for petitioners.

Office Supreme Court U. S.
FILED.
NOV 28 1892
JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. .....

EX PARTE CHRISTIAN VAN GUNDEN ET AL.,
PETITIONERS.

PRELIMINARY BRIEF OF LAW OF PETITIONERS.

In Re: PETITION FOR WRIT OF CERTIORARI

to the Circuit Court of Appeals for the Fourth Circuit to certify to the Supreme Court for its revision and determination the case of

CHRISTIAN VAN GUNDEN AND OTHERS,

vs.

THE VIRGINIA COAL AND IRON COMPANY,
(being No. 5 on the Docket of said Court.)

WILLIAM C. MAYNE, Philadelphia,
DANIEL H CHAMBERLAIN, New York,
F. S. BLAIR, and J. J. A. POWELL,
Wytheville, Virginia,
Attorneys and Counsel for Petitioners.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

October Term, 1892.—28*th November*, 1892.

EX PARTE: CHRISTIAN VAN GUNDEN, FRANK BRENTON, EDWIN F. PARTRIDGE, and CHARLES N. FOSTER, *Petitioners.*

Preliminary Brief Submitted with the Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit in the Case of—

CHRISTIAN VAN GUNDEN AND OTHERS, PLAINTIFFS IN ERROR,

vs.

THE VIRGINIA COAL AND IRON COMPANY, DEFENDANT IN ERROR.

This is an application for the writ of certiorari to require the United States circuit court of appeals for the fourth circuit to certify to this Court for its review and determination the above-entitled cause, in which the decision by said court against petitioners was rendered on 12th day of October term, 1892.

The application is made under section 6 of the act of March

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vs.

THE VIRGINIA COAL AND IRON COMPANY, DEFENDANT IN ERROR.

This is an application for the writ of certiorari to require the United States circuit court of appeals for the fourth circuit to certify to this Court for its review and determination the above-entitled cause, in which the decision by said court against petitioners was rendered on 12th day of October term, 1892.

The application is made under section 6 of the act of March

3, 1891, establishing the circuit courts of appeals. Notice of the application has been duly served and accepted by counsel for Virginia Coal and Iron Company, defendant in error, that counsel apply for this writ with the sincere conviction that its issuance will be in the interest of jurisprudence and uniformity of decision, will tend to avert diversity of judgment, and guard against inadvertence of conclusion in controversies involving weighty and serious matters.

It is with the belief, formed after a careful examination of the record, that it presents questions of such gravity and importance as to require the review of the conclusions of the circuit court of appeals in reference to them that this application is earnestly pressed upon the attention of the Court.

There is involved in this case the just construction of the Constitution of the United States both upon the question of the forfeiture acts of Virginia as also the just relation of that Constitution to the question of the legislative effect of a tax deed in Virginia, which have never been directly passed upon by this honorable Court.

That the precedents established by the conclusions of the circuit court of appeals are in irreconcilable variance and open conflict with the decisions of this honorable Court upon these most important and grave questions, to wit:

I. Whether the property, being the lands the subject of this controversy, while owned by non-residents of the State of Virginia, can be divested by the forfeiture acts of Virginia, which adjudge rights and property to be forfeited by mere legislative enactments, without a judicial hearing and without due process of law; and,

II. Whether such an alleged forfeiture, being evidenced only by an *ex parte* statement, unsigned and bearing no date, lodged in the office of the auditor of public accounts at Richmond, Virginia, nearly three hundred miles distant from the situs of the land alleged to be forfeited, can be applied as sufficient proof so as to charge the plaintiffs in this suit and thereby defeat their recovery in their action in the trial court below; and,

III. Whether evidence of an alleged forfeiture which in nowise sets up any notice, either to the plaintiffs or their grantors, can be considered the equivalent proof of a "sale" under such an alleged forfeiture; and,

IV. Whether the admission in evidence of a tax deed by the defendant can preclude plaintiffs from showing that the tax proceedings upon which it is based were irregular and void—*i. e.*, can, under the constitution and act of the assembly of the State of Virginia, lawfully declare such a deed conclusive evidence of the regularity of such tax proceedings; and,

V. Whether such tax deed, which by its recitals limits the interest of the grantee to a one equally undivided third interest, can be considered color of title to the other equally undivided two-thirds interest in the land the subject of this controversy; and,

VI. Whether non-residents, *bona fide* purchasers without notice, can be affected by an alleged conveyance of the ancestor of the heirs from whom plaintiffs purchase.

All of which propositions were affirmed by the trial court

below in its directions to the jury and which were the subject of the assignment of errors (p. 652 of printed record), and which said propositions were concurred in by the circuit court of appeals in its printed opinion delivered in this case (a copy of which is attached to printed record).

These questions, it is submitted, are of such a fundamental character that the precedents herein created by the circuit court of appeals will necessarily work a revolution in the jurisprudence of land-title law if they be allowed to remain.

That the lands the subject of this controversy are worth admittedly over two millions of dollars will be regarded by this honorable Court secondary to the gravity and importance of the questions involved, and which directly confound and overthrow the present decision of this Court as well as the settled practice of the courts of the different States throughout the Union.

STATEMENT.

The case is briefly this: This was an action of ejectment brought in the circuit court of the United States for the western district of Virginia, at Abingdon, by Christian Van Gunden, Edwin F. Partridge, and Frank Brenton, citizens of Pennsylvania, and Charles N. Foster, a citizen of Connecticut, against the Virginia Coal and Iron Company, a corporation of Virginia, from which diversity of citizenship of parties the jurisdiction of said court is made manifest.

It was for the recovery of one-third of about 48,200 acres of land, a portion of a patent issued to Nathan Field,

Nathaniel Taylor, and John Johnston, dated 30th day of January, 1796, by the Commonwealth of Virginia, then situate in Lee, but now in Wise, county, Virginia, the latter being a new county, organized in the year 1858.

The plaintiffs claim as innocent purchasers for value of said land from the heirs of said Nathan Field, who died intestate in the city of Philadelphia, Pa., July 20, 1820, seized and entitled to an undivided one-third part of said land as joint tenant with the said Taylor and Johnston.

This suit only concerns the said undivided one-third interest of said Nathan Field, which was conveyed by his heirs-at-law by a valid deed, dated April 30, 1888, to the plaintiffs in this action.

The defendant, The Virginia Coal and Iron Company, claims title only by a tax deed derived by one John T. Olinger at a tax sale of the interest of Nathaniel Taylor, made October, 1834, which sale resulted in a deed to said Olinger from one Mills, clerk of the county court of Lee county, in 1836, and the said Olinger conveyed his said interest, whatever it was, which he purchased at said tax sale to intermediate parties, who conveyed to the said defendant company.

That the said defendant insisted that the said plaintiffs' right to a recovery in this action ought to be defeated, because—

I. That the land the subject of this controversy had been forfeited to the Commonwealth of Virginia; and,

II. That an alleged outstanding conveyance of the ancestor of the heirs from whom plaintiffs purchased was notice

to effect said plaintiffs' recovery, notwithstanding that it was admittedly never recorded in the county, the situs of the land, nor any allegata or probata of any other character of notice to the plaintiffs in this suit except an alleged abandonment of the land the subject of this controversy by the ancestor of the heirs from whom plaintiffs purchased; and,

III. That a tax deed purporting by the recitals on its face to convey but an undivided third, reciting therein the interest of one of the original patentees under whom plaintiffs did not claim to hold, was color of title to the other two undivided third interests as well as to the interest it purported to convey, and that the effect of this deed was conclusive and precluded said plaintiffs from attacking the same except only by showing such irregularities as were apparent on the face of the tax proceedings.

There was a verdict and judgment for the defendant in the said circuit court, which judgment was affirmed in the said circuit court of appeals for the fourth circuit of the United States. (Reference is here made to the petition for the application for the writ of certiorari in this case as explanatory of the misconception of counsel in not bringing this matter directly to the Supreme Court of the United States from the circuit court.)

THE LAW.

There is involved in this controversy the highly important constitutional question as to whether the property of Fields and Johnston, the joint tenants with said Taylor and who were non-residents of Virginia, can be divested by the for-

feiture acts of Virginia, which adjudge rights and property to be forfeited by mere legislative enactments, without a judicial hearing and without due process of law. The forfeitures claimed by the defendant of the said land were contended to occur in the year 1816 and to have resulted by virtue of the acts of Virginia of February 9, 1814, section 30, chapter 3, from acts 1813–'14, and that the said land was again forfeited in the year 1831 under tax act of Virginia of April 1, 1831, chapter 28, section 1, of acts of of 1830–31, by which acts, after making provision for the return of delinquency, advertisement, offer for sale, and sale, it is further provided that if no person shall offer to give for the land the amount of taxes and damages the title shall be thereupon vested in the literary fund. In other words, these acts in effect declare that upon a mere entry in the books of the taxing officers or certificate by them that the tax is unpaid, apart from proof that it was in fact unpaid, or that the necessary steps in assessment or collection have been taken, the lands become vested in the State. An inspection of the said Virginia statutes will show that as forfeiture acts they work out their own purpose and assume to effectually divest the title out of the owner without the machinery of any court of record or anything in the nature of an inquest of office; in other words, these forfeiture acts themselves of their own force and by their own energy assume to consummate and perfect the forfeiture of lands.

By reference to each of the said tax acts named it will be seen that the only notice prescribed to the owner is the posting of a tax-list at the front door of the court-house once a week for two months preceding the sale and the publication in *some* newspaper printed in the city of Rich-

mond. This *ex parte* advertisement on the door of some obscure court-house in the interior of the country or this publication in *some* newspaper which the owner may never see are the only notices allowed by said acts for the divestiture of the title of the lands of non-resident owners. We submit that this is not due process of law within the meaning of the terms as the Constitution employs them, and especially is this the case when applied to a non-resident, as was the case of Bar, where all of the plaintiffs were outside of and remote from Virginia. These tax acts present a living illustration of "a light hid under a bushel."

As the constitutionality of these Virginia statutes, which assume to divest the title of the owner of land without due process of law, have never been brought directly in review before your honorable Court, we shall beg the attention of the Court to the law and decisions upon this point.

It will be borne in mind that the entire evidence or *proof* of forfeiture in this case consists in a certificate of the auditor of public accounts, found at p. 548 of the record, from which it appears merely that the taxes on the lands in question were delinquent from 1798 to 1801 and from 1812 to 1816, inclusive, and a second certificate of the same officer, at p. 549 of the record, to the effect that on the list of the delinquent lands in Lee county from 1821 to 1831, inclusive, the lands in question were returned delinquent, and that "opposite the entry of this tract the following memorandum" appears: "This tract vested in the literary fund in 1816 and is now redeemable; tax and damage, $349.82, to be added to those here charged."

I.

We will, therefore, now proceed to show that the said act is unconstitutional for the reason as before stated. We say: *No State has the constitutional right to forfeit to its own use the land of the citizen, nor can a State vest title to such lands in itself without some antecedent procedure which shall be equivalent to a judicial ascertainment of the fact or facts which are made the occasion or warrant of the forfeiture; in other words, equivalent to what is expressed and implied in the technical phrase "office found."*

The constitution of Virginia provides (article 1, section 1) "that all men * * * have certain inherent rights of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property. * * *" It contains no other provision on this subject, but this language is probably equivalent to that of the XIVth amendment to the Constitution of the United States in respect to depriving a person of his property without due process of law.

Cooley Const. Lim., ch. XI, p. 351 *et seq.*

The above provision has been made a part of the constitution of Virginia since the adoption of the bill of rights, in 1776.

The act of Virginia of April 1, 1831 (Va. Laws, 1830–'31, ch. 28), provides—

(SEC. 1.) That all lands vested in the literary fund by act of February 9, 1814, not redeemed before January 1 last past (1831), shall be forever irredeemable.

(SEC. 2.) That all lands returned delinquent for taxes of 1820 or prior years, not redeemed before January first next (1832), and all lands sold for taxes and redeemed by the executive, and not redeemed by the owners before January 1, 1832, are *absolutely forfeited*, and all rights, titles, &c., of persons, in whose names they were returned delinquent, shall be *absolutely vested* in the literary fund.

(SEC. 3.) That all lands returned delinquent for years subsequent to 1820 and prior to this act, not redeemed before November 1, 1833, shall be *absolutely forfeited*, and the titles *absolutely vested* in the literary fund.

(SEC. 4.) That any lands hereafter returned delinquent, and not redeemed for three years, are declared to be forfeited and forever irredeemable, and are vested absolutely in the literary fund.

The act of Virginia of February 9, 1814 (Acts Va., 1813–'14, ch. 3), provides in section 30, after making provision for return of delinquency, advertisement, offer for sale, &c., that if no person shall offer to give for the land the amount of taxes and damage the title shall be thereupon vested in the literary fund.

If these statutes mean that, upon a mere entry in the books of the taxing officers or certificate by them that the tax is unpaid (apart from proof that it was in fact unpaid), or that the necessary steps in assessment or collection were taken, lands can become vested in the State, they are unconstitutional.

Barber *vs.* Nelson, 1 Litt. (Ky.), 60:

The Kentucky statute of 1801 provided that "Any per-

son (infants and persons *non compos mentis* excepted) claiming lands in this State and failing to list the same for taxation shall, for and in consideration of such failure, forfeit his or her claim to the Commonwealth." The court says: "If, by the operation of this statute, the title to land is divested * * * immediately on a failure to comply with its requisitions in entering them for taxation, the instructions to the court below (viz., that if the jury believes the land had not been listed the title was forfeited), are correct; but if, before the title vests in the Commonwealth, the failure to enter the lands for taxation should be ascertained by an office of inquisition, then, as no such inquisition appears to have been taken, * * * the instruction of the court cannot be sustained.

"That there must be an office of inquisition before the title vests in the Commonwealth will be apparent if these rules of construction be applied which have invariably governed the English courts in expounding their acts of Parliament declaring forfeitures to the King.

* * * * * *

"If, therefore, those rules to which we have adverted are to have any influence on the construction of the statute of this country it is obvious that, before office found, the Commonwealth cannot be vested with the title to lands not entered for taxation, for the statute barely declares that the person failing to enter his land shall forfeit his claim to the Commonwealth, without containing any expressions from which it can be inferred that the legislature intended to dispense with the inquest of office."

Judgment reversed.

Robinson *vs.* Hoff, 3 Litt., 37:

The court says: "We are of opinion that the sale for taxes to the State did not pass the legal title. It is a well-known rule of the common law that no freehold might be given to the King nor derived from him but by matter of record.

"No doubt this principle applies to our Commonwealth as it did to the Crown, and it is doubtless a common-law rule, subject to the control of the legislature, but it is necessary that it should be changed before we can disregard it."

" * * * The act in question barely let in the State, as a purchaser or bidder at the register's sale, as to all tracts which could not be sold to others for the arrearages of taxes due. These were to be stricken off to the State."

Harlan *vs.* Seaton, 18 B. Munroe, 312:

Forfeiture claimed under same act in question in Barber *vs.* Nelson, and court decided, following that case, that, as there had been no inquest of office, the title was not divested by the mere failure to list lands for taxation.

Marshall *vs.* McDaniell, 12 Bush., 378 (1876):

Lindsay, C. J. (p. 382), after alluding to the act of 1801 and the construction thereof in Barber *vs.* Nelson, says: "Afterward, on the 12th of January, 1825, it was enacted 'that in all cases where any lands shall be hereafter forfeited * * * the title of such lands shall vest in the Commonwealth by virtue of this act without any inquest of office.'

* * * * * *

"Conceding that the proof shows *prima facie* the lands were not listed for taxation and that the failure to list falls within the scope of the act of 1825, we will proceed to in-

quire whether it was within the power of the legislature to provide for the infliction of such a penalty without an inquest of office found."

"In pursuing this inquiry we need not call in question the power of the legislature to provide for the levy and collection of taxes in the most summary manner. * * * But when such laws are enacted the forfeitures prescribed must be regarded as penalties, and they cannot be inflicted until inquiry has first been made and the commission of the offense ascertained by 'due course of law.'

"Self-enforcing penal statutes are repugnant to the plainest principles of justice and are utterly inconsistent with the fundamental maxims of a government in which the judicial power is vested in a department separate from and independent of the law-making power."

* * * * * *

"When it is attempted to pass title to the Commonwealth and to forfeit a citizen's property by way of punishing him for failing or neglecting to perform a public duty, his right to be heard in his own defense does not depend upon the rules of the common law; it is secured to him by the Constitution.

"We conclude without hesitation that so much of the act of 1825 as provided that, for a mere failure to list lands for taxation, the title should be forfeited and should *ipso facto*, without inquiry or trial and without opportunity to the party supposed to be in default even to manifest his innocence, be vested in the Commonwealth is unconstitutional and void."

Kinney *vs.* Beverly, 2 Hen. & Mun., 318.

Under the act of Virginia of 1790 it was held that the forfeiture could not take place without proceedings equivalent to office found, basing this conclusion on principles of the common law as laid down in English statutes and decisions. (See pp. 332–337.) Judge Tucker says in the course of his discussion of this point: "So in the present case although the taxes be not paid on certain lands the property of A in the county of B for the space of three years, whereby the right of these lands is forfeited to the Commonwealth, yet until an office be found or some other legal proceeding had (if any such can be pointed out) to show the certainty of the land, the seizing thereof is not in the Commonwealth to grant over."

He also says (p. 336): "But if no such previous inquiry be necessary, hath the defendant (who claimed under a grant of forfeited lands) shown that all that is necessary to be done on the part of the Commonwealth hath been done, so as to preclude the owner of the lands from objecting that the non-payment of the taxes on these lots is not imputable to himself, but to the ministers and officers of the Commonwealth? * * * Ought it not to have been shown that no distress sufficient to pay the taxes could be found on the premises," &c., &c.?

Judge Roane, who concurred in the result of the opinion of Judge Tucker, differed with him on the point of the right of the legislature to declare a forfeiture without office found, saying that there is not "any pretense to say that location under the act must be preceded by inquisition of office," but he agreed that, as it had not been shown that steps preliminary to forfeiture had been taken (or rather as it appeared

it had not been taken), no forfeiture took place and the location of and patent for the lands as forfeited were not valid.

Bennett *vs.* Hunter, 9 Wall., 326:

In this case the Supreme Court of the United States seems to give a similar interpretation of the meaning of a statute declaring a forfeiture as a declaration of the ground of forfeiture, not an absolute investiture of title, in construing an act reading: "That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for shall vest in the United States or in the purchasers," &c. (At page 335:) "The first clause of the act, therefore, is not to be considered as working an actual transfer of the land to the United States if a more liberal construction can be given to it consistently with its terms."

"Now, the general principles of the law of forfeiture seem to be inconsistent with such a transfer. Without pausing to inquire whether in any case the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that any act of sovereignty so highly penal is not to be inferred from language capable of any other construction. * * *"

"Applying these principles to the case in hand, it seems quite clear the first clause of the fourth section (above) was not intended by Congress to have the effect attributed to it independently of the second clause. It does not direct the possession and appropriation of the land. It was designed

rather, we think, to declare the ground of the forfeiture of title, namely, non-payment of taxes, while the second clause was intended to work the actual investment of the title, through a public act of the Government, in the United States or in the purchaser at the tax sale."

Griffin *vs.* Mixen, 38 Miss., 424:

Harris, J. (p. 434): "The question involved is whether the legislature had power by simple act of legislation to vest the title to lands delinquent for non-payment of taxes in the State of Mississippi.

* * * * * * *

"We do not question the power of the legislature to pass laws providing for the collection of taxes in the most summary manner, * * * but in doing so no private right, no constitutional provision, no great principle which lies at the foundation of our political system need be or must be violated."

The opinion proceeds with copious citations of authorities and elaborate argument to the conclusions that the acts in question are unconstitutional and void.

Handy, J., dissents from this conclusion and writes an elaborate and forcible opinion in support of his view.

U. S. *vs.* Repentigny, 5 Wall., 211:

This case is entirely consistent with the above and indeed supports the same rule, for it is said (p. 267) by Nelson, J.: "We agree that before a forfeiture or reunion with the public domain could take place a judicial inquiry should be instituted or, in the technical language of the common law, office found, *or its legal equivalent.* A legislative act direct-

ing the possession and appropriation of the land is not equivalent to office found."

The distinction between such a legislative act as is here intended and one which by force of its own provision declares a forfeiture *in advance* is made clear by the passage above cited from *Bennett* vs. *Hunter*, 9 Wall., 326, and by *Farnsworth* vs. *Minn. and Pac. R. R. Co.*, 92 U. S., 49, where it is said (p. 66) by Fields, J.: "A forfeiture by the State of an interest in lands * * * granted for the construction of a public work may be declared for non-compliance with the conditions annexed to their grant or to their possession, when the forfeiture is provided by statute, without judicial proceeding to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many inconveniences * * * but * * * where the grant is for the accomplishment of an object in which the public is concerned and is made by a law which expressly provides for the forfeiture when that object is not accomplished, * * * any public assertion by legislative act of the ownership of the State *after default of the grantee*, such as an act resuming control of them, will be equally effectual and operative."

Fairfax's Devisee *vs.* Hunter's Lessee, 7 Cranch, 603:

In this case it is claimed that certain lands in Virginia devised by Lord Fairfax to Denny Fairfax (an alien) were forfeited to and vested in the State of Virginia by virtue of the alienage of Denny Fairfax, and the plaintiff in the ejectment derived title under a grant from the State as of forfeited lands, made under an act which treated the lands of

aliens as being vested in the State. It was held that without inquest of office the title was not vested in the State nor divested out of an alien owner even so as to prevent his conveyance. Storage, J., says: "It is incontrovertibly settled upon the fullest authority that the title acquired by an alien by purchase is not divested until office found. * * * We will not say that it was not competent for the legislature (supposing no treaty in the way) by a special act to have vested the land in the Commonwealth without an inquest of office for the cause of alienage, but such an effect ought not, upon principles of public policy, to be presumed upon like grounds. * * * It has been argued that the act of 1785 amounts to a legislative appropriation of all the lands in controversy. * * * We cannot subscribe to the argument. In acts of sovereignty so highly penal it is against the ordinary rule to enlarge by implication and inference the extent of the language employed. * * * Perhaps as to grant under the fourth section * * * it might not be too much to hold that such grants conveyed no more than the title of the Commonwealth, viz, an inchoate right to be reduced into possession and consummated by a suit in the nature or with the effect of an inquest of office, but we give no opinion on this point."

The case of *McVeigh* vs. *United States*, 11 Wall., 259, points strongly in the same direction. McVeigh was the owner of property situated in Virginia, but was himself alleged to be a resident of the city of Richmond, within the Confederate lines, and a rebel. A libel was filed in the district court of the United States for the purpose of forfeiting and selling his real and personal property. McVeigh appeared by counsel and filed an answer; whereupon the attorney for the

United States moved to strike his appearance and answer from the files for the reason that he was "a resident of the city of Richmond, within the Confederate lines, and a rebel." This motion was granted, the property was condemned as forfeited and ordered to be sold, and to this decree a writ of error was sued out in the United States Supreme Court.

It was there held that, inasmuch as the fact of McVeigh's criminality as alleged in the libel was the foundation of the proceeding against his property, the order of the court condemning the same as forfeited and directing its sale was erroneous.

The Court says: "The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy and could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt upon the subject. It would be *contrary to the first principles of the social compact and of the right administration of justice.*"

Reynolds *vs.* Leiper's Heirs, 7 Ohio, 17:

In this case lands of L. had become forfeited for non-payment of taxes in 1826. In December, 1831, they were sold for the taxes of 1826–'31. In May, 1831, L. had died and his heirs, seeking in this proceeding to redeem, were opposed on the ground that the land was forfeited before their title accrued. The court says: "It is true that the legislature in the 15th section of the act of February 1, 1825, * * * say that when land is forfeited to the State for the non-payment of

taxes 'all the right, title, interest, and claim of the former owner thereof shall be considered divested out of said former owner and vested in the State of Ohio.' But to the same section is attached a proviso securing to such former owner or owners the privilege of reinvesting themselves with the same land upon the payment of all taxes, penalties * * * Notwithstanding the forfeiture therefor, it is apparent that a valuable interest remained in the former owner—the interest or right to redeem." And the court holds that this passed to the heirs, and that they were entitled to redeem after the sale by virtue of a proviso reserving this right to minors whose land was sold for delinquency.

Boggs *vs.* Commonwealth, 16 Va., 989:

This case arose under the laws of Virginia inflicting penalties on the taking of oysters in certain ways, which is made a crime, and declaring a forfeiture of the vessel used in taking oysters in the prohibited manner. No legal process was provided to enforce the forfeiture against the vessel, but in this case the court in which the offenders were convicted directed a sale of the vessel. The court of appeals held the act unconstitutional as taking property without due process of law. Staples, J., says: "Some exceptions to this rule (that one whose property is confiscated must have an opportunity to be heard) may be found in cases * * * where land and other property are forfeited to the Government for the non-payment of taxes by the owner. In these cases the owner is necessarily aware of his own delinquency and provision is almost universally made for allowing him time to redeem." *Query.* Does not this imply that where an absolute forfeiture is declared without an opportunity in

some judicial proceeding to prove that necessary steps were not taken the forfeiture would equally be void?

Woodward *vs.* Sloan, 27 Ohio St., 592:

In this case it was held that a deed purporting to convey land forfeited to the State for taxes was only *prima facie* evidence of the right of the State to convey; that "lands cannot be claimed as forfeited to the State for non-payment of taxes without a strict compliance with the statute authorizing the forfeiture" (p. 596), and that as it was shown that the lands were not on the delinquent list in the year when they were claimed to have been forfeited they were not legally forfeited, and the suspended sale was void.

Mayson *vs.* Banks, 59 Miss., 447:

Campbell, J.: "A sale of lands for taxes and striking off to the State, without any further act by the collector, would not vest title in the State. The list prescribed by the statute is the instrument by which title is to be vested in the State as, under the former law, the deeds executed by the collector did * * * There was no signature or certificate or authentication of any sort by the sheriff or other person in connection with this list, and this was the only evidence to show title in the State. It was not sufficient."

Dingey *vs.* Paxton, 60 Miss., 10 E. 38:

"This case holds that a law is unconstitutional which undertakes to declare titles unassailable after a certain short time which have previously been vested or attempted to be vested in the State by sales of lands as forfeited for taxes without regard to possible defect in the proceedings leading to such sale, which, in other words, attempts to cut off the

right of one whose property is alleged to be forfeited to show in judicial proceedings that it has not been legally forfeited."

Thevenin *vs.* Slocum, 16 Ohio, 519:

Under a statute providing that on non-payment of tax after certain proceedings, including offer for sale, the land, if there were no bidders, should be forfeited to the State, the court says (p. 532): "But the legislature have never treated this forfeiture as vesting the title in the State for any other purpose than as security for taxes due and owing. * * * In an action by such proprietor for the recovery for such forfeited lands we do not suppose that a defendant could defeat the plaintiff's action by showing merely that the land had been forfeited. He must show in addition that it has been sold as such forfeited land. Proving an outstanding title in the State by forfeiture would not be sufficient."

Hopkins *vs.* Sandridge, 31 Miss., 668:

The statute provided that a list of the delinquent land should be returned to a board of police on the first Monday of April; that afterwards certain steps should be taken which should vest title to the lands in the State, and that a certificate of the auditor should be evidence liable to be rebutted only by proof of the actual payment of the tax; but in this case the defendant was allowed to show that the list of delinquent land was not returned until the 2d Monday of April, and this being shown it was held that the forfeiture was not valid.

St. Anthony Falls W. P. Co. *vs.* Grely, 11 Minn., 321:

The court examines the return of the execution to see if

the directions of the statute have been carried out by the taxing officers and decides that, as there were defects in certain points, no forfeiture took place; also says (p. 326): "It is urged * * * that even if the sale to the defendant is void the plaintiff has no title to the land by reason of the said forfeiture. This position is not tenable. The mere neglect to redeem the land or pay the taxes * * * did not work such a forfeiture as of itself to divest the plaintiffs' title and to prevent the plaintiffs from maintaining an action against the purchaser at the tax sale to test the validity of the proceedings."

Martin *vs.* Barbour, 140 U. S., 634:

In this case the court, holding a sale to the State for unpaid taxes invalid for want of compliance with statutory requirements and permitting the owner to redeem from a purchaser from the State, says (p. 647): "The appellant took his deed for the land in the same condition in which the State held it and subject to the same equities and defenses."

Baker *vs.* Kelly, 11 Minn., 480:

The court held unconstitutional a statute which provided that when land delinquent or forfeited for taxes had been sold any action brought to test the validity of such sale or by any one claiming adversely thereto must be brought within one year after the recording of the tax deed, holding that the act was not a statute of limitation, but deprived the owner of his property unless he were ejected and so placed in a position to sue for the recovery of his land and, in the suit, question the tax sale within the year fixed by the statute. Wilson, Ch. J., says (p. 497): "The true interpre-

tation of these constitutional phrases, due process of law, &c., is that when rights are acquired by the citizen under the existing law there is no power in any branch of the Government to take them away, but when they are held contrary to the existing law or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in a due administration of the law itself—before the judicial tribunal of the State."

Hill *vs.* Lund, 13 Minn., 451:

The court in this case, in deciding that an action brought by the owner in possession to quiet title was barred under the same statute referred to in Baker against Kelly, distinguishes this from that case, and implies that if it was sought to eject the owner from his possession he might still contest the validity of the forfeiture or sale.

Dentler *vs.* The State, 4 Blackf., 258:

An application was made to a court to adjudge that certain lands should vest in the State under a statute prescribing certain steps to be taken as to reporting and advertising delinquent lands. Such decree was made. The appellate court set it aside on the application of one claiming to be the owner of the property because the advertisement did not state that a motion for judgment would be made.

Davis *vs.* Hare, 32 Ark., 387:

Land was erroneously returned both in the name of the actual owner and occupant and of another. For non-payment of taxes by the latter it was certified on the auditor's books as delinquent and forfeited and a deed given to a

purchaser from the State. This was set aside as based on an invalid forfeiture in a suit to quiet title by the real owner.

Greesbeck *vs.* Seeley, 13 Mich., 329:

A statute provided that after five years a title to property sold by the State for taxes should be absolute and indefeasible.

The court held this unconstitutional as depriving persons of their property without due process of law. It held the act not to be a statute of limitations, since it attempted to validate titles held by persons out of possession as against those in possession, and said (p. 343): "To hold that under any circumstances a man can be deprived of a legal title without a hearing is impossible without destroying the entire foundations of constitutional protection to property."

Calhoun *vs.* Fletcher, 63 Ala., 574:

An ordinance of a city provided that upon sale of land for taxes the collector should put the purchaser in possession, and that his certificate should be evidence of a right to possess the premises.

This was held as unconstitutional as depriving the citizen of property without due process of law. Stone, J., quotes with approval from Dorman *vs.* State (34 Ala., 216): "The expressions 'the law of the land,' &c., * * * have always been held to mean a judicial proceeding regularly conducted in a court of justice as contradistinguished from statutory enactment. * * * An act of the legislature is not, and nothing less than a regular judicial trial is 'due course of

law' within the meaning of this clause of the Constitution."

Inhabitants of Williamsburg *vs.* Lord, 51 Me., 599:

An Action by the Town to Recover Land Claimed to be Forfeited for Taxes.

Cutting, J.: "The demandants, in order to prevail, must show a strict compliance with the law, both in the assessment of subsequent proceedings of their collector and treasurer, unless the tenant is precluded from offering any defense by force of R. S. of 1857, ch. 6, sec. 145, which provides that 'no person shall be entitled to commence, maintain, or defend any action * * * on any ground involving the validity of any such sale until the amount of all taxes * * * shall have been paid. * * *'

"That portion of the section * * * refers to the *sales* of the collector * * * and has no relation to the act of 1844, under which the demandants claim title * * * by a *forfeiture* and not by a *sale*. The tenant, therefore, may require proof of the legality of the assessment and of all legal proceedings in its enforcement. * * * The town for that year had only two assessors, one less than the law required. * * * Two assessors are not authorized to assess a tax when they only have been qualified."

Demandants nonsuit.

Hill *vs.* Mason, 38 Maine, 461:

Tenney, J.: "The covenant of warranty against encumbrances, * * * it is insisted, has been broken by reason

of the non-payment of taxes assessed thereon, which has been followed by a forfeiture of title to the town.

* * * * * * *

"By R. S., ch. 14, sec. 76, when no person shall appear to discharge the taxes * * * the collector shall make a true copy of so much of the assessment as relates to the taxes due on such real estate and certify the same to the treasurer of the town. By sec. 77 the treasurer is required to record the same, &c., and advertise in the newspapers, &c. By sec. 82, if any taxes shall remain unpaid, &c., the treasurer shall publish notice. * * * By sec. 87 in any trial, &c., involving the validity of the title of the town to any land forfeited for the non-payment of taxes it shall be sufficient for the town to produce the assessment signed by the assessors and prove that notice of such assessment was advertised by the treasurer, as provided in secs. 77 and 82. * * *

" * * * The statement of facts fails to show certain things which are indispensable to work a forfeiture of the land in the former owner. It does not appear that the collector ever certified to the treasurer delinquencies of payment of taxes upon real estate in the town of Clifton. Consequently the proof is wanting that advertisements were published within three months thereof. There is nothing showing that a copy of the delinquencies was lodged with the town clerk, as is required by the statutes.

"Other errors in the assessment * * * and subsequent proceeding may perhaps avail, but their consideration is not required for a decision of the case. By the facts presented no absolute title adverse to that of the plaintiff and nothing which can ripen into such title or become an encumbrance upon the land is shown.

Plaintiff nonsuit.

State *vs.* Heman, 70 Mo., 441 :

The court holds (upon collating the section with other sections of the same act) that sec. 116 of the act of 1865, reading as follows, "Every tract or town lot offered for sale by the collector, as hereinafter provided, and not sold for want of bidders shall be, and the same is hereby, declared forfeited to the State of Missouri, and thenceforth all right, title, and interest of every person whomsoever in and to such land shall be considered as transferred to and vested absolutely in the State, and such real estate shall not afterwards in any case be subject to taxation and sale as other lands, except as hereinafter provided, until again sold to some person by the State or redeemed," does not vest an absolute title in the State, but only gives it a lien on the land for the taxes.

State *vs.* Thompson, 18 S. C., 538 :

Action by the State to Recover Possession of Land Claimed to be Forfeited.

Simpson, Ch. J. (p. 540): "It was then urged by the plaintiff that as under the 116th section * * * the deed of the county auditor for any real estate sold at delinquent land sale shall be *prima facie* evidence of a good title, so under the 117th section of the same act, where the land became forfeited to the State, the forfeiture carried with it a *prima facie* title to the State. As to this the presiding judge held that as the words *prima facie*, which were found in sec. 116, * * * did not appear in sec. 117, where forfeiture to the State took place, he could not supply them by construction. He therefore overruled the position of the plain-

tiff, holding that the *onus probandi* rested with the State to establish a good title. * * * We also concur with the presiding judge. * * * We must suppose that the legislature intended * * * that * * * in the case of the stringent doctrine of forfeiture * * * the State should be required to make out its case."

Fischel *vs.* Mercier, 32 La. Ann., 704:

Fenner, J.: "The plaintiff claims possession of the property of defendant under a tax collector's title, * * * said property having been previously adjudicated to the State at a tax sale, * * * and demands to be put into possession, as directed by sec. 4 of the act 47 of 1873.

"An analysis * * * will disclose the following necessary requisites to a valid sale * * * by a tax collector, viz., [naming seven]. * * *

"* * * It conclusively appears that the tax collectors are only authorized to give title where the property has been '*sold in pursuance of this act*,' and it is equally apparent that a sale is not made 'in pursuance of the act' unless the express requirements heretofore enumerated have been complied with. * * * And it is only 'on the presentation of a title so given that the courts are required * * * to put such persons in possession. * * *

"The nature and form of the judicial proceeding authorized to be taken to obtain possession are not clearly defined in the act. This court has, however, interpreted it and has held * * * as adopted with reference to the general laws relating to summary proceedings in the courts of the State and as authorizing the district courts to which application is to be made to require the necessary legal notice to

be issued to the party to be ousted and to dispose of the contest in a summary manner. (Stave *vs.* Judge, 27 A., 704.)

"We certainly consider this interpretation not only reasonable, but absolutely necessary in order to give any validity whatever to the provision referred to. The proposition that a man be turned 'neck and heels' out of his home or out of possession of any other property under an order of the court made upon a mere presentation paper, without any opportunity afforded to contest its genuineness or, even if genuine, its validity, involves too absurd a violation of the constitutional prohibition against depriving a man of his property 'without due process of law' to have it supposed that such a contention could ever have been entertained by a legislature. The law evidently contemplates a 'judicial proceeding.'

"The summary proceedings allowed in the assessment and collection of taxes are to some extent exceptional, but they do not intend to exempt from the operation of the general principle proceedings for the enforcement of titles to property under tax sales."

Nalle's Representatives *vs.* Fenwick, 4 Rand. (Va.), 585:

The head-note, in part, is as follows:

"Where a *naked* power is given by law to an officer or other person, that power must be strictly pursued, especially if such a proceeding involve a forfeiture, and it devolves on him who claims a right under the exercise of such a power to show that it was in all respects exactly pursued.

"Therefore where land is sold by a sheriff for non-payment of taxes it is encumbent on the purchaser to show that

all the steps have been regularly taken which the law requires in such cases."

Corbin *vs.* Hill, 21 Iowa, 70:

Cole, J.: "The plaintiff, to establish his case, introduced a tax deed made by the treasurer of Scott county on the 18th day of February, 1865, in the statutory form. * * *

"The question is as to the sufficiency of the tax warrant. The plaintiff's counsel insist that under the statute (Revision, section 784) the tax deed is *conclusive* evidence that all the prerequisites of the law in this particular were complied with. But if this was the only ground for reliance we should have little or no difficulty in reversing the case. The tax warrant is a material and fundamental step in the sale for taxes, and the rightfulness of any sale must rest upon the *fact* of such warrant, and it is not competent for the legisture to create a presumption which shall override the fact or estop the party proving the truth."

Marx *vs.* Hanthorn, 30 Fed. Rep., 579:

The court held that it is beyond the constitutional power of the legislature to make a tax deed conclusive evidence of those steps in the assessment and collection of a tax which are necessary to give the owner of property notice and an opportunity to be heard, since this would be taking property without due process of law (pp. 584, 585).

Bannen *vs.* Burns, 39 Fed. Rep. (1889), is a case of great weight by analogy. This was an action of ejectment, the plaintiff claiming title under a tax deed. The statute (or charter) authorizing tax sales attempted to render a tax deed conclusive evidence that the facts which alone would

authorize sale and deed did actually occur. The court, however, say: "It is to be conceded that the provisions of this character respecting the validity of such deed is very sweeping; and while the courts should treat with great respect the enactments of the legislative department of government, yet the courts, which stand as a last resort of the citizen and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even the legislature cannot do. It cannot take the citizen's private property, even for public use, without due process of law. It cannot describe a method by and the conditions on which property may be sold for taxes and by the same act declare that when sold the deed shall be good, although the prescribed method was not pursued and the required conditions of sale were not regarded, especially when such conditions are precedent facts essential to confer jurisdiction on the body or power undertaking to sell. Due process of law is not any process which legislative power may devise. Many authorities are here quoted and explained in harmony with this view."

Scharf *vs.* Tasker, 21 Atlantic Reporter, is also a valuable recent case, decided in 1891 by the court of appeals in Maryland, which should here be referred to.

An act provided that all owners of certain military land granted by the State 100 years ago must prove title by April 1, 1891, and, on failure to comply, "all their rights shall be forfeited to the State." The court say: "But the legislature exceeded the limit of its authority when it undertook in the same section to forfeit the property—the title and estate—of all unknown owners upon their failure to produce within the time designated the evidence of their title." "It

needs no argument to show that the title of the unknown owners of these lots cannot be forfeited without due process of law, and that such legislation as this is far from having even the semblance of due process of law." They therefore held this provision void.

Blackwell on Tax Titles (5th ed., 1889):

While concluding, on the whole, that the constitutional provision for due process of law does not necessarily require an inquest of office *eo nomine* prior to the forfeiture, but may be satisfied by an opportunity to question the forfeiture in judicial proceedings (*e. g.*, a suit in ejectment) after it had been declared to accrue (see sections 75 and 1026 to 1045, *passim*), says (section 1033): "Where the land, instead of being struck off to the State as a bidder at a tax sale, is declared to be 'forfeited to the State,' or equivalent language is used, it is a serious question whether an inquisition is not necessary in order to divest the title of the rightful proprietor and vest it in the State. It is a maxim of the common law that the words 'shall forfeit' vest in the King a simple right to enforce the forfeiture upon office found, and not the freehold in deed or law." Citing *Kinney* vs. *Beverly*; *Robinson* vs. *Huff*; *Fairfax's Devisees* vs. *Hunter's Lessees*; *Barbour* vs. *Nelson*; *Reynolds* vs. *Leiper's Heirs*.

Hilliard on Taxation, ch. XV, sec. 8:

"As we strictly have intimated, the law enforces a very strict observance of the formalities connected with the whole process of taxation, in order to sustain a title to lands under a tax sale. To sustain a title under such sale the party must show that all the prerequisites of the sale were per-

formed (citing several cases). The simple production of a deed from an authorized officer is not sufficient to establish title. The proceedings which authorized him to sell must be proved. The officer's certificate required by statute is only evidence of his own acts; nor is it *prima facie* evidence of them unless the particular acts done are stated." * * *

SEC. 9. "The general ground upon which this rigid rule rests is that such sales stand upon the footing of the execution of a *naked power.* * * * The great principle that no individual or public officer can sell and convey a good title to the land of another, unless authorized to do so by express law, and * * * must pursue with precision the course prescribed by law * * * applies."

Cooley on Taxation says, as to the burden of proof, 2nd ed., p. 472:

"At the common law it was necessary that one who claimed to have obtained title to property of another under proceedings based upon a neglect of public duty should take upon himself the burden of showing that the duty existed and had not been performed, and that in the consequent proceedings the law had been complied with by those who had them in charge, especially if the proceedings would operate with severity and be in their effects something in the nature of a forfeiture.

* * * * * * *

"This rule of the common law has not been modified by decisions and is still recognized and enforced where statutes have not changed it. It may consequently be said to be the general rule that the party claiming lands under a sale for taxes must show affirmatively that the law under which the

sale was made has been substantially complied with, not only in the sale itself, but in all the anterior proceedings." (Citing many cases.)

Statutes declaring forfeitures must be strictly construed and all their requirements strictly complied with.

This is declared to be an elementary principle by all the text books:

Cooley (2nd ed., pp. 462, 463, and cases cited);

Blackwell (5th ed.), secs. 1027, 1030;

Black, sec. 72;

and is laid down in many cases.

Tolman *vs.* Hobbs, 68 Me., 316:

Peters, J.: "It is claimed that the land in dispute was forfeited to the State for non-payment of taxes and then sold by the State to the demandant. The proceedings creating such forfeiture are to be strictly construed."

By section 46, ch. 6, R. S., the State treasurer was required to publish in certain newspapers a list of the land to be sold, with the amount of the unpaid taxes, interests, and costs on each parcel, three weeks successively, within three months before the time of sale.

The only evidence of his compliance with this requirement is contained in the record of the treasurer's doings, a copy of which, by section 49 of chapter before named, is made *prima facie* evidence in any court of the facts set forth therein. The record declares thus: "Previous to said sale and within three months therefrom I caused notice and time and place of said sale and lists of said tracts intended for sale, with the amount of such unpaid takes, interest, and cost on each parcel, to be published three weeks successively,

as follows, viz: 1, In the Kennebec Journal, the State paper, a list of all said tract; 2, in the Elisworth American, a newspaper printed in the county of Hancock, a list of all said tracts which lie in that county."

"This record asserts that a publication was made of the amount of unpaid taxes from interests and costs on each parcel, but does not state where published. It states that the lists were published in the newspapers named and there the statement stops. There is no positive and certain statement that anything else was advertised in them. This is not enough."

Deforest *vs.* Thompson, 40 Fed. Rep., 375 (U. S. C. C., Dist. W. Va., 1889):

"Holding that a failure to comply with certain requirements as to notices, listing, and returning lands to be forfeited by a self-enforcing statute rendered the forfeiture void."

See also

Bennett *vs.* Hunter, 9 Wall., 326 (quoted above).
Fairfax *vs.* Hunter, 7 Cranch, 625.

SUMMARY.

Reviewing the cases above cited, they may be classified with some approach to accuracy as follows:

First. There are many cases in the State courts which decide positively that there must be an inquest of office in order to enforce a forfeiture for non-payment of taxes.

To these cases may be added that of Fairfax *vs.* Hunter, 7

Cranch, 603, which concerned the forfeiture for alienage, and the passage from Blackwell on Tax Titles above quoted.

Second. There are three cases in the Supreme Court of the United States, viz., Bennett *vs.* Hunter, 9th Wall., 326; U. S. *vs.* Repentigny, 5 Wall., 211; Farnsworth *vs.* M. P. R. R., 92 U. S., 49, which held that there must be an inquest of office or its equivalent in order to make a forfeiture for taxes effectual, and which held the legislative act operating in future not to be such equivalent, and this same rule is expressed or suggested in Mason *vs.* Banks, 59th Miss., 447; Thevenin *vs.* Slocum, 16th Ohio, 519; Calhoun *vs.* Fletcher, 63 Ala., 574.

Third. There are numerous cases in many States holding with more or less directness that the constitutional prohibition against taking property without due process of law does not permit a forfeiture for non-payment of taxes to be enforced without either requiring the State or party alleging the forfeiture or at least permitting the party disputing it to contest, in a judicial proceeding, the existence and regularity of all the essential steps in the assessment, &c., leading to forfeiture.

Fourth. There are a few cases which distinctly recognize a principle which may be said to underlie all the above cases, viz., that the forfeitures declared by statutes for non-payment of taxes do not really or fully divest the owner's title nor vest it in the State, but amount simply to liens until steps have been taken to foreclose such liens.

Such cases are—

Reynolds *vs.* Leiper Heirs, 7 Ohio, 17.
Thevenin *vs.* Slocum, 16 Ohio, 519.
St. Anthony *vs.* Greely, 11th Minn., 221.
State *vs.* Heeman, 7th Mo., 441.

Fifth. The rule that statutes of forfeiture are to be strictly construed and not enlarged is abundantly established by all the authorities herein cited.

The conclusion must be that the statutes of Virginia relied on here to establish a forfeiture were unconstitutional and vested no title to the lands in question in the State, and hence did not divest the plaintiffs of title.

And that such an alleged forfeiture being evidenced only by an *ex parte* statement, unsigned and bearing no date lodged in the office of auditor of public accounts, is not sufficient proof to work a divestiture of plaintiffs' title.

And that only upon a sale predicated upon "due process of law" or its equivalent can the property of the non-resident owner be divested.

II.

By the action of the honorable circuit court of appeals, as shown under the 13th caption of the petition, the tax deed is made conclusive evidence of the recitals contained therein unless an irregularity appears upon the face of the proceedings, the language of the act providing in effect that the conclusive force of the tax deed shall prevail, "notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appears on

the face of the proceedings." The legislature of Virginia, then, by said act has not only made the said tax deed *prima facie* evidence of the recitals therein, but has imparted to the said tax deed the effect of the conclusiveness as to proof of the recitals therein and in the proceedings from which the deed arose unless such irregularity appears on the face of the proceedings themselves. The constitutional objection to this act is that the legislature has declared that in the contingency named the deed and proceedings shall be proof of the facts contained therein unless an irregularity appears upon the face of the proceedings, and has thus given to said deed a weight of evidence to which it is not entitled, and thus has prevented the owner from having his controversy determined by rules of evidence on the trial which obtain in all well-regulated tribunals controlled by the constitutional law.

Upon this subject we beg to refer to Cooley on Constitutional Limitations, 6th edition, top pages 452 and 453, and notes thereto.

III.

The tax deed of 1836 from Mills, clerk, to Olinger, the person through whom the defendant claims, was made under the authority of an act of March 10, 1832, which defines with particularity the exact interest that passed by said sale and by said tax deed. The land was sold as and for the default of Taylor's heirs alone and not for the default of Fields or Johnston, and hence Olinger, the purchaser, under the express language of the act acquired legal title only to such interest as Taylor's heirs had in the land at the time of the sale. Olinger, the tax purchaser, took his

deed from the clerk with the *recitals therein* that the only interest conveyed to him was the estate of right, title, interest, and claim of Taylor's heirs, in whose name and for the non-payment of whose taxes the said 48,200 acres were advertised and sold. The defendant set up the tax-sale deed to Olinger of 1836 as its muniment of title; but this deed on its face purported to convey *only the interest of Taylor's heirs.* Now, who was Taylor? One of the original grantees in the patent. What interest did Taylor own? Taylor owned an undivided one-third part only of said land, while the other two-thirds belonged to his copatentees, Field and Johnston. This action was brought for the share and interest of Fields, which had descended from Fields to his heirs-at-law and which had been granted by them to the plaintiffs in the action, who were purchasers for value and without any notice of any kind of any outstanding hostile claim to their title. This deed from the clerk purports only to convey the interest of Taylor's heirs in this property, and this appears both in the recital and in the conveying clause in the deed:

> "Whereas a certain tract or parcel of land lying
> "and being in the county of Lee, Virginia, containing
> "48,200 acres, has been returned *delinquent in the*
> "*name of the heirs of Nathaniel Taylor*, for the non-
> "payment of taxes due thereon for the year 1834,
> "which taxes, with the damages thereon chargeable
> "by law upon the said tract or parcel of land, amount
> "to the sum of $4.92—
>
> * * * * * *
>
> "Now, this indenture witnesseth: That the said
> "Alexander W. Mills, clerk, as aforesaid, doth hereby

"convey, assign and transfer, etc., to the said John "T. Olinger, and his heirs, *all of the estate*, right, title, "interest and claim to the said tract or parcel of "land," (that is, to the tract or parcel *in the name of* "*the heirs of Nathaniel Taylor*), *which he is authorized* "*to convey, under the provisions of an act entitled—etc.*— "*Passed March 10th*, 1832.

Then what was he entitled to convey by the act of March 10, 1832? This is the act that was given in evidence, and the twentieth section thereof is as follows:

"All sales of lands and lots made in pursuance of "this act, and not redeemed within the period afore- "said shall be good and effectual in law, for passing "*such estate only as shall be vested in the persons charged* "*with the taxes, for the non-payment whereof such sale* "*shall be made.*"

The person for whose delinquency this land was sold was Nathaniel Taylor's heirs, and the conveyance made by the clerk under that sale was limited by the act itself, which alone gave him his authority to the interest which belonged to the party in whose name it was returned delinquent, namely, *the heirs of Nathaniel Taylor*. Therefore this title purported to convey and did convey only the interest of Nathaniel Taylor's heirs in this land, and by this conveyance from the clerk Olinger became the owner of the interest of Taylor's heirs and of nothing more. Now, what was the interest of Taylor's heirs at that time? It was a right to one undivided third of said land *jointly with Fields and Johnston*. If that was the case at that time, then the pur-

chase and possession by Olinger of the Taylor one-third was simply the purchase and possession of the interest of one cotenant. The supreme court of appeals of Virginia in construing the statute named under which this tax deed was made have decided that the tax deed to Olinger only conveyed to him the interest of the party, to wit, Taylor's heirs, that was sold for the tax sale. See Clark and Gates against Lawson, 32d (Va.) Gratt., p. 12.

The Code of Virginia, 1887, section 2419, page 591, provides that when a deed purports to convey a greater interest than the grantor has it shall be construed to convey only the interest he has. This being true, as a grantor himself, it is true *a fortiori* where the land is sold at a tax sale. The tax deed only conveys such interest as was vested in the party assessed with the taxes—*i. e.*, the interest of the party in whose name the land was returned delinquent. The land was returned, as stated, in the name of Taylor. See Flanagan *vs.* Grinnet, 10 Gratt., 434; Hutchison on Land Titles, sections 52, 53, 427, and 171; Hobbs *vs.* Shumate, 11 Gratt., 518; Miller *vs.* Williams, 15 Gratt., 213.

IV.

We come now to the effort of the defendant to show *adverse possession* under this tax deed as color of title and in accordance with this deed to Olinger and his heirs and through him and them to the defendant. This land, as was abundantly proven, is wild land, uncultivated and unenclosed. In 32 Grattan (Va.), on page 27, we have a case which is of so late a date (1879) that it fully expresses the law of Virginia upon that subject as it now stands. In speaking on the subject of adversary possession as applied

to wild and uncultivated lands the Virginia supreme court says:

> "This court has repeatedly held that wild and uncultivated lands cannot be the subject of adversary possession whilst they remain completely in a state of nature. A change in their condition to some extent is essential. Evidence short of this may 'prove an adversary *claim*, but in the nature of things cannot accomplish an adversary *possession*, nor is there any reason for relaxing the rules of law on this subject in behalf of the adversary claimant of such property."

When applied to the present case, the case which the court was discussing, it further says:

> "In the present case the only improvement upon the land in controversy was the small clearing occupied by Simpkins. It has been already seen that this occupation did not constitute an adversary possession in any just or legal acceptation of the terms. The residue of the tract being wholly in a state of nature, covered by unbroken forests, could not be the subject of adversary possession. The mere fact that herds of cattle were driven upon and permitted to wander over its hills without restraint scarcely, under the circumstances, amounted to a claim of ownership. Other persons in the community owning cattle exercised the same privilege of salting and ranging without question, but that privilege did not go to establish adversary possession."

Now, the defendant relied upon proof to establish Olinger's adversary possession, the mere occupation and cultivation *of some small patches or parcels of this land.* That is all. It is in testimony in this case, from the mouths of two surveyors of the court, *that ninety-five per cent. of this tract is still wild and uncultivated and to-day in a state of nature.*

V.

We come now to what has just been alluded to, to wit, the contention of the defendant that the said tax deed constituted color of title to all of said lands. This contention is contrary to both the plain language of the tax deed and of the tax act under which the clerk executed it. The defendants did not enter under any color of title to anything more than the one-third interest of Taylor sold at said tax sale. The said deed neither conveys nor can it be color of title to the interest of Fields or Johnston, because on its face, both in the reciting and conveying clause, it limits the interest conveyed to be only the interest of the Taylor heirs, and if the deed did not so recite and limit the *quantum* of interest conveyed by the deed, the 20th section of the act of March 10, 1832, under authority of which alone the clerk made the said tax deed to Olinger, directly limits the estate conveyed as that vested in the person charged with the taxes and for the non-payment whereof the tax sale was made. This admittedly was the Taylor heirs. Olinger took a deed from the clerk, the recitals of which informed him that there was only conveyed to him the interests of Taylor's heirs and nothing more. Olinger had no color of title beyond this.

What is color of title? It means any instrument or writing *which purports* to give a title, no matter whether it is a good title or a bad one. The essential of "color of title" is that there shall be something which "purports to give title." In this deed of the clerk to Olinger there is not one word that *purports to give title* to anything except the interest of Taylor's heirs. As already shown, the 20th section of the tax act limits the conveyance to this interest; and these recitals being contained in the deed and the deed containing a direct reference to the provisions of the act under which the tax deed was made, the said recitals or *notice* to Olinger and those who claim under him that said tax deed only purported to give title to the extent of the interest of said Nathaniel Taylor heirs.

It is well settled law that the doctrine of *caveat emptor* applies to tax sales and all judicial sales. We need scarcely cite authority to sustain so elementary a proposition as this.

Then the recitals of the deed from the clerk to Olinger call attention to the tax act under which it was made, and the deed refers expressly to the extent of the interest conveyed and the authorities that limit the interest to the Taylor estate, and this is clear notice, as already stated, to Olinger and his grantees and those who claim under him. It is settled law that he who purchases any object with notice of the right of another is affected by that notice, whether it be expressed or implied, and that where a deed of assignment referred to a deed of trust, or where a deed refers to a will, or where it gives any notice of an outstanding interest in another, such deed becomes notice to the grantee and those claiming under him, and they take such property conveyed with notice of

the equitable rights of another and become trustees for that other to the extent of his equity. Here Olinger, by the tax deed, having notice that he only took Taylor's interest and that Taylor was a co-tenant of Fields and Johnston, the said Olinger was merely substituted to the condition of the said Taylor and became a tenant in common along with said Fields and Johnston. Upon the subject of the notice of the tax deed as limiting it to Taylor, and that thus it was not color of title except as to the Taylor one-third interest in said land, see the following authorities: Graff, &c., *vs.* Castleman, &c., 5th Randolph (Va.) Reports, pages 207-'8, and cases there cited; Lawson's Rights, Remedies, and Practice, vol. 5, secs. 2284 and 2285.

In Buswell on Limitations and Adverse Possession, section 256, it is said: "Nor will a deed give color of title beyond the estate which it *purports* to pass."

In Sedgwick and Wait on Trial to Title of Land, section 768, it is also stated: "A deed cannot operate as color of title so as to have effect beyond the estate which it professess to pass."

The Virginia court of appeals, in Hollingsworth *vs.* Sherman and others, 81st Virginia Reports, 668, have decided the same point, that a grantee who enters under color of a deed can only avail himself of possession to the extent and quality of the estate conveyed.

In Stevens *vs.* Wait, 112th Ill. Reports, 544, the owner of the lands conveyed it to his five children. One of the children, who of course was a coparcener with the other children, reconveyed to the grantors by a deed that *purported* to convey, not the undivided one-fifth interest, but the entire tract. It was held that the legal effect of the reconveyance was the

same as if it had purported to convey only the interest which the grantor then held, to wit, an undivided fifth part, and that thus, the original grantor having acquired an undivided one-fifth interest in the land, he became a tenant in common with the other four owners to whom he had previously conveyed, and his deed was not color of title, except as to his undivided fifth interest, and his possession was not adverse to the other four owners.

In Cowan *vs.* Lindsay, 30th Wis., 586, the party took a deed at a sheriff's sale which *purported* to convey the interest which the judgment debtor had, and he sought to hold all of the said land by adverse possession under said deed, but it was decided that his possession was not adverse to the debtor's, and that no length of possession would bar her claim, because the deed itself limited the interest that it conveyed to that of the judgment debtor, and as color of title it could not be extended beyond that.

In Brooks *vs.* Bruyn, 35th Ill., 394, it was decided that a deed or any instrument from a grantor to a grantee can give color of title only to the extent of the lands *intended* to be conveyed.

In Bath *vs.* Valdez, 11th Pacific Rep. (Cal.), 724, there was a deed *which purported to convey* the whole property, and the grantee went into possession of the whole, and it was held good title by adverse possession in the grantee expressly *upon the ground that he had no notice of the co-tenancy that existed;* so in Safford *vs.* Stubbs, 7th Northeastern Rep. (Ill.), 653, where a grantor who had only a life estate conveyed the entire interest, and it was held to be adverse to the reversioners; but the supreme court of Illinois on page 655 uses this language: "*There is no proof that either Reiner or*

Burkey ever had any notice of its contents (the will). Neither of them had any notice, so far as this record discloses, that the interest of Weiser in the premises was merely that of a life tenant. It may be that Burkey, though he had been in possession and paid taxes for seven years after the tenant for life died, would be debarred from setting up the statute against the owners of the remainder if he had had notice that his grantor's interest was only a tenancy pur autre vie." The Illinois court then referred to the case of Dugan *vs.* Follett, 100 Ill., 581.

The case of Saunders *vs.* Silvey, 55th Texas, 46, is equally applicable, because it holds that the second purchaser *having notice* that he took an undivided interest in the survey, that a deed conveying him a designated interest could not be color of title against the other owner of the undivided interest in the survey.

It was, therefore, a grave error in the learned circuit court of appeals, on page 20 of its opinion, in sustaining the circuit court, to use the following language: "Again, if the deed to Olinger conveyed to him all the land that was on the book in the name of Taylor's heirs, and that was all the tract originally patented to Fields, Taylor, and Johnston not theretofore sold, and if it was in the deed described by metes and bounds, and Olinger entered into the possession thereof claiming title to all, and exercised acts of ownership over it in the manner set forth in the instructions, then the deed was color of title; and if he had possession under it and claimed adversely to all others for the period of time prescribed by law, then the plaintiff in this suit could not recover." It is respectfully submitted that this language of the honorable appellate court is the more remarkable from the fact that in the paragraph on page twenty and just preceding the one

quoted from said printed opinion, the said honorable court also say: "It must be admitted that by the act of March 10, 1832, under which it is claimed that the land was sold in the name of Taylor's heirs, Olinger by the deed made by him to Mills acquired a legal title to such interest only as Taylor's heirs had in the land at the time of the sale."

The said honorable court wholly lost sight of the proposition of law that color of title is limited to the interest conveyed by the written instrument; that where a deed or writing by its recitals describes and defines the interest conveyed, that such deed or instrument can only be color of title to this extent, and there can be no possession, either actual or constructive, of any other lands or any greater interest than that described or defined by the deed itself. It would be a fraud on the co-tenants Fields and Johnston to permit Olinger to use as color of title against them a deed that merely conveyed to him the undivided one-third interest of Taylor, the other co-tenant.

Again, the said tax deed cannot be color of title as against Fields and Johnston, because any possession under it would be entirely consistent with the constructive possession and right conferred on Fields and Johnston by the patent of 1796. It is well-settled law that the color of title in order to be so must be accompanied by a possession that is hostile, adversary, and inconsistent with the claims of others.

OUSTER.

By the patent from the Commonwealth of Virginia, Johnston, Taylor, and Fields *became joint tenants of all said land*, and by the tax sale to Olinger of Taylor's interest he became a tenant in common with Fields and Johnston. This being

the relation of the parties, let us inquire what was necessary on Olinger's part in order to oust his co-tenants.

The entry of one co-tenant is deemed the entry of all, and this presumption prevails until some notorious act of ouster or adverse possession by the party so entering. (See Clymer *vs.* Dawkins, 3d Howard, 374.) It is true tenants in common may oust co-tenants; but silent possession, unaccompanied by acts amounting to ouster or giving of notice, is not construed as adverse possession. (McClung *vs.* Ross, 5th Wheat., 116.) Where plaintiff in ejectment was tenant in common with defendant their possession was his until he was ousted. (Mining Co. *vs.* Taylor, 100 U. S., 37.) In this last case Taylor, the plaintiff, purchased one of the undivided interests and the company purchased the interest of other owners. It was held by the Supreme Court of the United States that by the company's purchase it succeeded to a tenancy in common, and the possession of one co-tenant was the possession of the other, and that such possession continued, and that neither of the defendants nor any one else by mere possession could oust the plaintiff so as to constitute a bar under the statute of limitations.

In Todd *vs.* Todd the supreme court of Illinois (found in 7th Northeastern Reporter, at page 585), declared that a co-tenant, by going into possession of the land and occupying the same and appropriating all the rents and profits to his own use, *would not thereby render such possession adverse;* that the law requires something more; that it requires an ouster brought home to the knowledge and notice of the other co-tenant, and that court cites the case of Busch *vs.* Huston, 75th Ill., 347, where the court declared as follows :

"It is *not sufficient* that he continues to occupy the "premises and appropriates to himself the exclusive "rents and profits, makes light repairs and improve- "ments on the land, and pays the taxes, for all this "may be *consistent with the continued recognition of the "rights of his co-tenants.* To constitute a disseizin there "must be outward acts of exclusive ownership of an "unequivocal character, overt and notorious, and of "such nature as by their own import to impart in- "formation and give notice to the co-tenants that an "adverse possession and an actual disseizin are in- "tended to be asserted."

The possession by Olinger and those who claimed under him was entirely *consistent with the possession of Johnson and Fields,* and should not be construed as an adversary possession; for, as between tenants in common and all others claiming in privity, the entry and possession of one is the entry and possession of all; and this presumption will prevail in favor of all until some ouster or adversary possession are *brought home to the notice and knowledge of the others;* and it has been frequently decided that until there is notice brought home to the other co-tenants of such ouster or adversary possession such possession *will be deemed to be amicable,* and this notwithstanding such possession in fact may have been wholly adversary. This is the well-matured opinion of the supreme court of Virginia in Caperton *vs.* Gregory, 11th Gratt., 506. The Supreme Court of the United States, in Zeller's Lessee *vs.* Eckert and others, 4th Howard U. S. R., 289 and 296, says that "a clear, positive, continued disclaimer of title and the assertion of an adverse

right to be brought home to the knowledge of the other co-tenants are *indispensable.*"

The presumption is that such holding is friendly, and the co-tenant has the right to so understand until he has *notice* to the contrary. (See Holley *vs.* Hawley, 94th American Decis., 350.)

Every possession by one joint tenant will be construed and presumed to be *consistent with the possession of co-tenant* unless it be shown to have been claimed and held otherwise (see Den *vs.* Webb, 25th American Decis., 711); and, as already shown, even exclusive possession of the land by one tenant in common and the receipt of all the profits of the land for a great length of time are not sufficient to create a legal presumption of the ouster of a co-tenant. (See Bolton *vs.* Hamilton, 37th American Decis., 509; Watson *vs.* Gregg, 36th American Decis., 176, and Warfield *vs.* Lindell, 77th American Decis., 614.)

VI.

We will now summarize as follows:

(*a.*) The patent of January 30, 1796, from the Commonwealth of Virginia to Fields, Taylor, and Johnston, granting the land in controversy, by mere operation of law conferred constructive seizin or possession of all the lands embraced in said patent on said three joint patentees. (See Taylor *vs.* Burnside, 1st Gratt. (Va.), 211.)

(*b.*) The patent to Fields, Taylor, and Johnston created a joint tenancy between them.

See Thornton *vs.* Thornton, 3rd Randolph (Va.), 188; 1st Call (Va.), 458; Freeman on Co-Tenancy, section 91, p. 149;

11 American and English Encyclopedia of Law, p. 1061 and note.

(*c.*) The said Fields, Taylor, and Johnston having become joint tenants by the mere emanation of the patent, the possession of one was the possession of the other, and they were seized of all the land embraced in said patent *per mie et per tout*—that is, each of them has the entire possession, as well of every part as of the whole. (See Buswell, Limitations and Adverse Possession, section 296.)

(*d.*) As already shown, the land in controversy having been sold for the delinquent tax of Nathaniel Taylor alone, the effect of said tax sale in 1834 and of the tax deed from Mills, clerk, to Olinger, the tax purchaser in 1836, was merely to convey to said purchaser the one undivided third interest of the said Taylor, and the said purchaser, Olinger, became a tenant in common along with Fields and Johnston, the other two patentees, the only difference being that one of the unities of joint tenancy had become broken by the deed of Taylor's interest to Olinger, and the relation between Fields, Johnston, and Olinger became that of tenancy in common.

(*e.*) Olinger having become a purchaser of the Taylor undivided one-third interest at said tax sale, and the deed from the clerk by its express recital having conveyed to him that interest only, he became a tenant in common with said Fields and Johnston, and the possession of Olinger of any part of said land was the joint possession of himself and the said Fields and Johnston his co-tenants; and, being such a tenant in common under a tax deed that limited his interest

by its recital and by the tax law itself to the Taylor interest, his possession could not be adverse to the possession and title of his said co-tenant, except by an actual *ouster* of them by him or notorious acts amounting to a total denial of the rights of said co-tenants brought home to them. The reason of this is that already given, that the possession of one co-tenant is the possession of all. If there was not an actual dispossession of the other co-tenants by Olinger, then any claim of exclusive ownership of the land on his part must, by knowledge and notice to his co-tenant, have been brought home to them, and he must have held it in that manner for the statutory period after such *ouster* notice or knowledge. No such condition of things has ever been proven to exist in this case.

See Creekman *vs.* Creekman, 75 Virginia, 430; Mining Co. *vs.* Taylor, 100 U. S., 37; Caperton *vs.* Gregory, 11 Gratt., 505; Purcell *vs.* Willson, 4 Gratt., 16; Clymer *vs.* Dorkins, 3 Howard, 674; Forrer *vs.* Forrer, 29 Gratt., 144; 2 Minor's Inst., 406; Buchanan *vs.* King's Heirs, 22 Gratt., 414; Robinett *vs.* Preston, 2 Rob., 276; Hutchison on Land Titles, p. 19, sec. 53.

(*f.*) The said land or ninety-five per cent. thereof being in a state of nature, the defendant could have no possession of the same amounting to adversary possession except by residence, improvement, cultivation, or other open, notorious, or habitual acts of ownership that amounted to a change in the condition of the land, and it must have continued in possession of such changed condition for the period prescribed by law before this action was brought.

See Turpin *vs.* Saunders, 32d Gratt., 27; Taylor *vs.* Burnside, 1st Gratt., 165. Now, the foregoing is the law of ejectment between mere strangers, but does not obtain where there is such confidential relation existing, as obtains in this case, between said tenants in common. It is insisted by us that although it were conceded that the defendant had any adversary possession of the patches or portions of the five per cent. of said land, yet there has been no possession by the defendant of any kind inconsistent with the possession of the cotenant.

(*g.*) It must be borne in mind that the statute of limitations in force at the time that the plaintiffs' right first accrued determines the period of time of that limitation.

Hollinsworth *vs.* Sherman, 81st Virginia, 668.

(*h.*) The period from April 17, 1861, to January 1, 1869, being seven years eight months and thirteen days, is excluded from the computation in the statute of limitations of Virginia. See Virginia Mining Co. *vs.* Hoover, 82d Virginia, 451.

(*i.*) The cotenancy existing between the heirs of John T. Olinger and those of Fields and Johnson cannot be claimed to have been broken until the heirs of Olinger assumed to sell and convey *all of said lands* in the month of April, in the year 1880, and the record shows no pretense of an ouster until that time.

(*j.*) This suit was brought in March, 1890, and thus it was within less than ten years, the shortest period of limitation known to the Virginia law, after the said sale and conveyance, in April, 1880. This completely dispels all theory that

this action was barred by limitation or that there was any actual ouster of the Fields heirs by Olinger or those claiming under him until April, 1880, which was less than ten years before this suit was brought, in March, 1890.

The deed to Olinger was made in 1836, and he died in 1863; this suit was brought in March, 1890. The act of February 5, 1831, in the Supplement of the Revised Code of Virginia, 1819, page 201, was the law which defined the limitation to the right of action of Fields to recover possession of said land, and under said act the period was *twenty-five years.* This right of action, existing when the entry was made under the tax deed, is barred only, if liable to be barred, under the laws then in force. (See Code of Virginia, 1849, chapter 149, section 19; Code of Virginia, 1860, chapter 149, section 19, and Code of Virginia, 1873, chapter 146, section 22.)

No ouster is pretended, however, *until within ten years* before said suit was brought, while by the Code of 1849, chapter 149, the statutory period was fifteen years, and was reduced to ten years by the Code of 1860, chapter 149; but during all this time there was no sort of adversary occupation or possession of said land in controversy in this case, as it appears from the evidence, ninety-five per cent. of it being still in a state of nature, and the only possession of any kind ever taken of it was the laying off of a small part of it and digging coal therefrom and erecting temporary buildings thereon, and much of which possession was afterwards entirely abandoned. But from said possession, by the laws of Virginia, by an act passed March 2, 1866, and found in the Virginia Code of 1873, chapter 146, sections 6 and 7, the period from 17th of April, 1861, to January 1, 1869, being

seven years eight months and thirteen days, is *excluded* from the computation in the statute of limitations (see Virginia Mining Company *vs.* Hoover, 82nd Va., 451); so that the statute of limitations by no possibility could run against the plaintiffs in said action of ejectment, either under the Code of 1819 of twenty-five years, under Code of 1849 of fifteen years, or under the Code of 1860 of ten years, so as to bar the plaintiffs' action, which was brought in March, 1890; and hence, although the statute of limitations ought never to have cut any figure in this case for the foregoing reasons, the honorable circuit court by its instructions treated the case as though this were a case *between strangers* and *not between co-tenants*, and as though there had been evidence introduced showing an ouster of the other co-tenants by the defendants and those who claimed under them.

VII.

This brings us to the last contention of the defendant, which was that Fields had conveyed his interest to his joint tenant, Taylor, by a deed dated January 1, 1796, and that thus Fields had parted with all of his interest and that the plaintiffs in the action took nothing by their deed from the heirs of the said Fields. The opinion of the courts, both appellate and circuit, will show that this deed was sustained. From an examination of the written opinion of the appellate court, on page 6, it will be found that said court held that by said deed of January 1, 1796, the said Fields had conveyed his interest to the said Taylor. Now, we can demonstrate both that the said deed did not convey said interest of Fields and it was wholly inadmissible in evidence for any purpose, and that the court below erred in ever admitting

said deed to go to the jury for any purpose, and especially in instructing the jury, as shown in the petition for *certiorari* in this case, that there was evidence sufficient to establish the existence of the said deed. We will now proceed to present *seriatim* the objections to the said deed and the error of the appellate court in its opinion:

(*a.*) The learned court failed to remember that this action was not a controversy between the parties to the said pretended deed of Fields to Taylor, but that it was a controversy between the plaintiffs, who were *bona fide* purchasers, for a valuable consideration, without any notice whatever of the existence of such a deed.

(*b.*) The said deed was never recorded in Lee county, Virginia, where the lands were situate, while the said lands were therein situate, nor was said deed ever recorded in the county of Wise, which was taken from Lee county and in which said land is still situate. By the Virginia Code, 1887, section 2465, no deed is valid against *bona fide* purchasers for value unless and until it is recorded in the county where the land is situate. Such was also the law at the time the said deed is claimed to have been executed and has been the law in Virginia since the year 1792, as will be seen from Virginia act passed December 13, 1792. This deed, as stated, was never recorded in the county where the land was situate, and therefore was not notice to the plaintiffs, who were *bona fide* purchasers for value without notice. 76th Virginia Rep., 491, and 13th Gratt., 613.

(*c.*) The pretended deed from Nathan Fields to Nathaniel Taylor of January 1, 1796, was recorded in Carter county,

State of Tennessee, in the year 1816, and a copy from the record of Tennessee was brought to Virginia and recorded in Scott county, Virginia, where this land was *not situate*. The said deed was therefore wholly void as to the plaintiffs in this suit. In the case of Rains *vs.* Walker, 77th Virginia, 92, it was decided that a deed not acknowledged or not certified according to law, though actually admitted to record, cannot be read in evidence as a recorded deed *except as between the parties themselves to the deed*. At the time this pretended deed purports to have been executed the Virginia statute which will be found in section 629, page 327, of Hutchison's Land Titles of Virginia provided that where the party who signs and seals the deed does not reside in Virginia the acknowledgment by him or the proof by the witnesses of the sealing and delivery thereof should be before any court of law, &c., of the city, town, or county in which such party shall dwell, certified by said court in the manner such acts are usually authenticated by them, and shall be offered to the proper court to be recorded *within eighteen months* after the sealing and delivery where the party resides out of the State. See secs. 5 and 7, chap. 99, 1st Revised Code, 1819, and see 2d Leigh. (Va.), 186, where it will be seen that the act of December 13, 1792, under which said deed was executed, was not repealed until the year 1819; and thus it is clear that at the time this pretended deed purports to have been executed it was neither acknowledged, proven, nor recorded in the mode prescribed by the registry laws of Virginia. The certificate to this deed certifies that it was delivered in the presence of two persons in Carter county, Tennessee, and the handwriting was proved by a third person, and that the

deed, although executed on the 1st of January, 1792, was not recorded even in Tennessee until the year 1816, and after its acknowledgment there a mere copy of a copy was admitted in evidence in this case; that this deed was not admissible in evidence for any purpose. See also Whiteacre against McInhamie, 4th Munford (Va.), 312.

In the last-named case a copy of a deed certified by the clerk of the court was offered and received as evidence in the court below. One was a deed for a conveyance of land, and the Virginia court of appeals, upon appeal, held that the deed, being only a copy of a copy, was inadmissible and ought not to have gone o the jury, and uses this language: "And this being *a copy of a copy*, the deed from Samuel Love and Hugh Stuart, two of the commissioners, to Theodrick Lee, the third commissioner, ought to have been rejected." So that, so far as this alleged deed appears before the court as a *copy of a copy* that had been brought from Tennessee to Virginia, it is clearly inadmissible for any purpose; and yet the honorable appellate court, on page 6 of the printed opinion, stated that it was proper to permit the said copy of said deed from the records of Scott county, Virginia, to be read as evidence. They admit that the said deed had been proven in Tennessee and recorded there and a certified copy of it had been recorded in Scott county, and while the honorable court declared that the said deed was not constructive notice against the plaintiffs as purchasers for value without notice, yet it sustained the ruling of the court below in admitting a copy of a copy of said deed as evidence before the jury to affect the plaintiffs in this action.

(*d.*) This alleged deed was dated before the patent was

issued for the land in controversy, to wit, on the 1st of January, 1796, while the patent did not issue until January 30, 1796. See 2d Call, 547; 3d Call, 259; 4th Randolph, 365; 1st Munford, 161, and 1st Gratt., 211. These authorities show that the said Taylor should have obtained a caveat against the said Fields to prevent the issuance of the said subsequent patents of January 30 if the said deed of January 1 had been *bona fide.*

(*e.*) It is earnestly submitted that the pretended deed itself on its face does not indicate that it conveys the land in controversy at all. The only reference in said deed to any lands that have been tortured by the most strained construction to apply to the lands in controversy is found in that part of the deed, on page 215 of the printed record, where Nathan Fields purports to sell to Nathaniel Taylor his interest in a number of tracts of land granted by the State of Virginia to himself and others, lying in Lee and Russell counties, granted to himself and to himself and others, and by the aid of the will of the said Nathaniel Taylor, found on page 224 of same record, where, in the second paragraph thereof, the said Taylor says he wishes his executors to sell as much of *my back land* and other property as can be best spared as will be sufficient to pay all my just debts. It was this general deed, not describing any land whatever and never recorded in the county where the land was situated, that the said honorable court admitted in evidence, contrary to the registry acts of Virginia, as evidence against the plaintiffs, who were purchasers for value of the said Fields' interest without any notice whatever of the existence of said deed.

CONCLUSION.

Counsel for petitioners submit that by the petition and brief it is demonstrated that the decision of the circuit court of appeals involves questions of gravity and importance and such as are of general public concern.

In addition to the general importance of the questions, which are of great constitutional importance, it is submitted that the obvious fact that they will arise with great frequency in litigation before the Federal judiciary increases the importance of a binding adjudication by this honorable court so as to preserve the uniformity of decisions that now obtain as the settled practice of the courts of the different States throughout the Union, and thus avert a diversity of judgments in the interest of jurisprudence for the purpose of setting at repose the title to vested rights in controversy involving the title to real estate.

WILLIAM C. MAYNE,
DANIEL H. CHAMBERLAIN,
J. J. A. POWELL,
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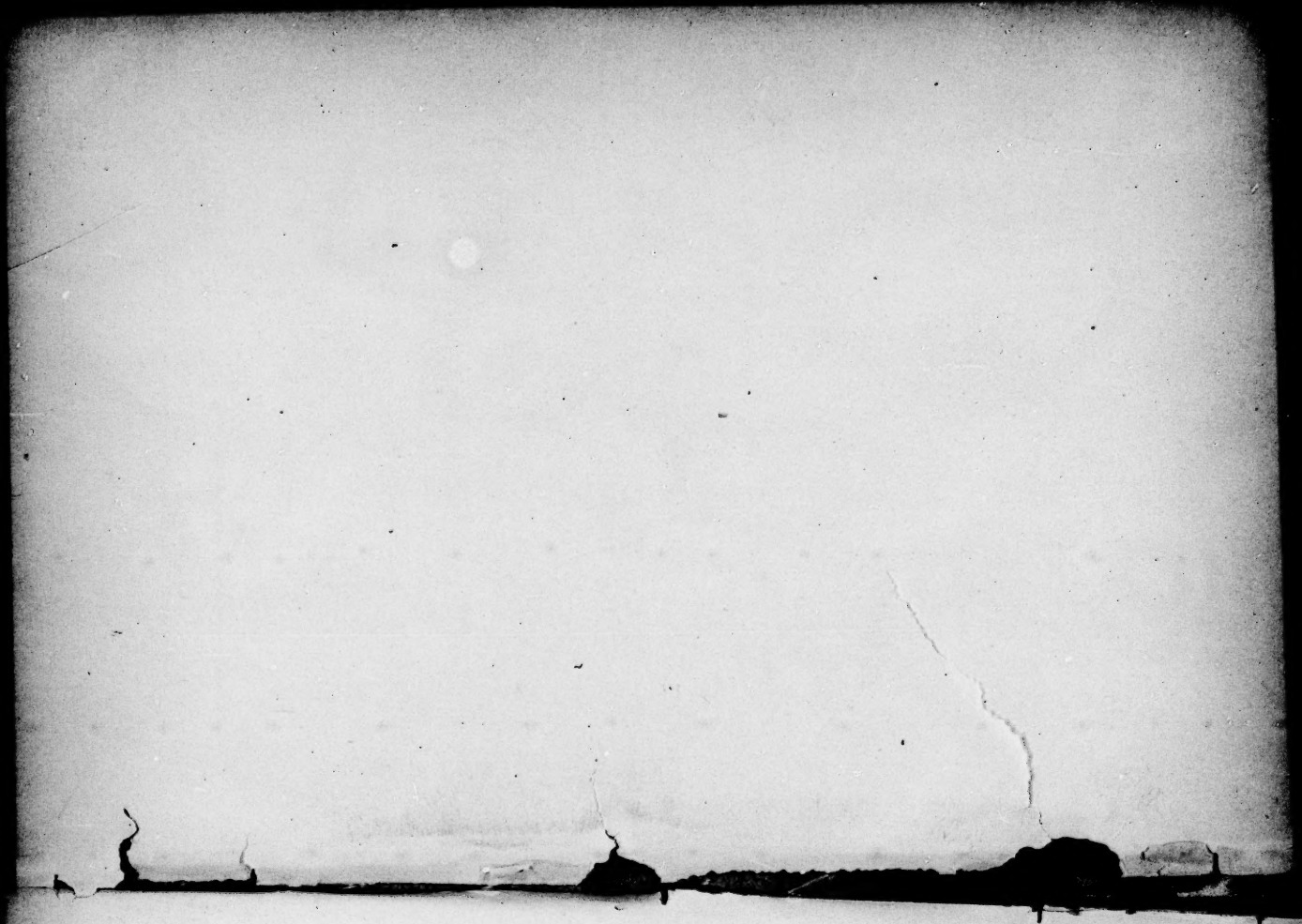
Counsel for Petitioners.



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1246

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No......

EX PARTE CHRISTIAN VAN GUNDEN *ET AL.*,
PETITIONERS.

SUPPLEMENTAL BRIEF OF PETITIONERS.

IN RE PETITION FOR WRIT OF CERTIORARI.

WILLIAM C. MAYNE,
DANIEL H. CHAMBERLAIN.
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EX PARTE CHRISTIAN VAN GUNDEN *ET AL.*,
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SUPPLEMENTAL BRIEF OF PETITIONERS.

IN RE PETITION FOR WRIT OF CERTIORARI.

To the Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court for its Revision and Determination the Case of Christian Van Gunden and Others against The Virginia Coal and Iron Company (being No. 5 on the Docket of said Court):

I.

The petitioners respectfully insist that the opinion of the circuit court of appeals in this case—

"That the evidence offered by defendants on that question (forfeiture) tends to show forfeiture for the non-payment of taxes for years prior to 1831" (p. 11 of the opinion), and

That in sustaining the circuit court below in its qualification of petitioners' instruction (Nos. 2 and 3) "that said land had not been forfeited to the Commonwealth," being the subject of assignment of errors (Nos. 18 and 19) in the following ruling:

"The matter of the forfeiture of the land to the Commonwealth * * * was properly submitted to the determination of the jury. * * * If the title to the land had been in the "literary fund" by forfeiture, then Olinger, by his purchase under the act of 1832, if the sale was properly made thereunder, acquired the entire tract of land, subject to the payment of taxes in arrear" (pages 12, 13, and 14 of the opinion); and

That in sustaining the circuit court below in striking out "and all other facts and circumstances of the case" therein contained in petitioners' instruction (No. 5), to wit: "The court instruct the jury that the forfeiture of the land in controversy to the Commonwealth of Virginia is a question for the jury to determine, and in arriving at their determination they will take into consideration the certificate of the auditor of public accounts, along with the certified extracts from the land books from the county of Lee, and the certified copy from the circuit superior court of law and chancery for the county of Lee, 'and all the other facts and circumstances of the case,'" * * * being the subject of assignment of error (No. 20) in the following ruling:

"After a careful examination of the record we are unable to find therein any facts and circumstances of the case pertinent to the question of forfeiture, other than those mentioned in the instruction given." And in sustaining assignment of error (No. 23) in the following language:

"Assignment of error number twenty-three on the question of forfeiture, is in effect disposed of with number twenty, before alluded to.

"The matter was left to the jury for its finding.

"The 3334th section of the Code of Virginia expressly pro-

vides that the auditor's certificates shall be *prima facie* proof of the facts stated in them.

"This was not as clearly stated in the instruction as it might have been, but that was not to the prejudice of the plaintiffs, and they will not be permitted to complain of it now.

"The plaintiffs in error insist that the State of Virginia had not the right to forfeit to its own use the lands situate within that State and owned by citizens of that and other States, and that the State of Virginia could not vest title to such lands in itself without some antecedent procedure which would be equivalent to a judicial ascertainment of the facts which are made the occasion of the forfeiture.

"The supreme court of Virginia has in a number of cases virtually disposed of this question, and the decisions of that court relative to the 'forfeiture acts' passed by the legislature of that State will be accepted as conclusive of that point by this Court. See the cases of Wild's Lessees *vs.* Serpell, 10 Grat., 405; Staats *vs.* Board, 10 Gratt., 400; Hale *vs.* Branscum, 10 Gratt., 418."

II.

It is respectfully submitted these rulings, both in the instructions by the circuit court below to the jury and in the sustaining of the same by the circuit court of appeals, squarely bring before this honorable Court the constitutional constructions herein involved, to wit:

The constitutional provision that no person shall be deprived of property "without due process of law."

III.

And it is respectfully submitted that by the decision of the circuit court of appeals in this case the decisions of the supreme court of the State of Virginia are expressly sustained in the principle above quoted, to wit:

That the State of Virginia had the right to forfeit to its own use the lands of a non-resident owner and could thus

vest title to such lands in itself "without some antecedent procedure which would be an equivalent to a judicial ascertainment of the facts which are made the occasion of the forfeiture."

IV.

It is respectfully submitted that this decision is directly in conflict with the uniform decisions of this Court, to wit:

a.

That the constitutional provision that no person shall be deprived of property without due process of law is a rule founded upon the first principles of natural justice older than written constitutions.*

b.

That whenever by the laws of a State or by State authority a tax, assessment, servitude, or other burden is imposed upon property for the public use and no provision is made for notice to the person taxed and no opportunity for confirming or contesting the charge thus imposed in the ordinary courts of justice, the judgment in such proceedings does deprive the owner of his property without due process of law.*

c.

That the general principles of the law of forfeiture that the title of a citizen to his land cannot be divested by forfeiture and vested absolutely in the State without any inquisition of record or some public transaction equivalent to office found, for it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred,† and

That before a forfeiture or reunion with the public domain could take place a judicial inquiry should be instituted, or, in the technical language of the common law, office found or its equivalent.†

V.

That an act of Congress of March 3, 1891, establishing circuit court of appeals and defining and regulating the jurisdiction of the courts of the United States (26 Stat., 826, c. 57.)

Under section 5 appeals or writs of error may be taken directly to this court in six specified classes of cases.

Among which are:

(4.) In any case that involves the construction or application of the Constitution of the United States; and

(6.) In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.‡ (See paragraph No. 2, petition for writ of certiorari presented in this case of *In re* Van Gunden and others.)

CONCLUSION.

That the right of the State to forfeit the lands of non-resident owners and vest the same absolutely in the State without any inquisition of record or judicial inquiry is an act of sovereignty so highly penal that the rule laid down by this honorable Court, "that whenever by the laws of a State or by State authority a tax assessment, servitude, or other burden is imposed upon property for the public use and no provision is made for notice to the person taxed and no opportunity for confirming or contesting the charge thus imposed in the ordinary courts of justice, the judgment in such proceedings does deprive the owner of his property 'without due process of law,'" it is respectfully submitted, ought to be applied.*

That the record and decision of the circuit court of appeals in this case presents questions of weighty and serious matter, involving the just construction and application of the Constitution of the United States, and that therefore, in the interest of jurisprudence and uniformity of decision, to avert diversity of judgment and inadvertence of law herein involved.†

* Davidson *vs.* New Orleans, 96 U. S., 97.
* Hagar *vs.* Reclamation Dist., 111 U. S., 701.
* Spencer *vs.* Martin, 125 U. S., 345.
* Wolston *vs.* Nevin, 128 U. S., 578.
* Palmer *vs.* McMahon, 133 U. S., 660.
† United States *vs.* Lee, 106 U. S., 196.
‡ Law Ow Bew *vs.* U. S., 144 U. S., 47.

Respectfully submitted.

WILLIAM C. MAYNE,
DANIEL H. CHAMBERLAIN.
J. S. BLAIR,
J. J. A. POWELL,
Attorneys and Counsel for Petitioners.

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No. . October Term, 1892.

IN THE

Supreme Court of the United States.

Ex parte Christian Van Gunden *et al.*, Petitioners.

BRIEF OF ARGUMENT FOR THE VIRGINIA COAL AND IRON COMPANY IN OPPOSITION TO THE PETITION FOR *CERTIORARI*.

RICHARD C. DALE,
J. F. BULLITT,
R. A. AYERS,
For the Virginia Coal and Iron Company.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1892. No.

EX PARTE CHRISTIAN VAN GUNDEN *ET AL.*, PETITIONERS.

BRIEF OF ARGUMENT FOR THE VIRGINIA COAL AND IRON COMPANY IN OPPOSITION TO THE PETITION FOR CERTIORARI.

The petition filed in behalf of Christian Van Gunden and others for a writ of *certiorari* to the Circuit Court of Appeals for the Fourth Circuit, to certify to this court for its revision and determination the case of Christian Van Gunden and others against the Virginia Coal and Iron Company, presents two grounds upon which the application is based:—

A. That the Virginia statutes of February 9th, 1814, and April 1st, 1831, providing for the forfeiture to the Trustees of the Literary Fund of wild lands for non-payment of taxes, are of no force, because they impair rights secured to the petitioners by the Constitution of the United States.

B. That certain instructions given upon the trial of this cause, relating to principles applicable to an action of ejectment in Virginia, were erroneous.

First.—As to the constitutional question. It is sufficient to say that the discussion of this question, which is introduced into the petition, has no place in the case. The constitutional validity of the forfeiture laws of Virginia have stood unquestioned for nearly a century. Titles have been maintained and defended upon them both in the courts of Virginia and

in the Federal courts, and no doubt has ever been expressed by any court.

At the trial of this cause the plaintiffs, as well as the defendants below, requested instructions, which assumed the constitutional validity of the Forfeiture Acts (see plaintiff's requests for instructions, Nos. 4 and 5, record, pages 635–6), raising no question as to the validity of the statute, but asking instructions for their proper application. There is no assignment of error in the record which raises the question, and there is no attempt in the petition to point out how the question is raised upon this record, and therefore we submit there is no merit in the application so far as it is based upon this ground.

The question of the constitutional validity of the statutes in their relations to the Constitution of Virginia was passed upon in Wild's Lessees *vs.* Serpell, 10 Grattan, 405, where Justice Lee said:—

"Upon these subjects (that is, as to the power of the legislature to forfeit lands, &c.) I have nothing therefore to say upon this occasion, except that, considering the peculiar condition of things in that part of the State lying west of the Allegheny Mountains, and the serious checks to population, and the improvement of the country, and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact them was clear and unquestionable."

The law, as thus pronounced in Virginia, remains unsettled by any counter decision. The attempt upon page 9 of the petition to suggest a change by reference to the case of Boggs *vs.* Commonwealth, 76 Virginia, 989, fails when the case is examined. It did not arise under the Land Forfeiture Acts, but under an Act relating to the forfeiture of oyster boats, and the decision contains nothing not in harmony with the law as settled in Wild's Lessee *vs.* Serpell, *supra*.

Second.—None of the other questions suggested in the petition are of the gravity or general importance for which such an application will be entertained, as settled by *In re* Woods, 143 U. S., 202, where Mr. Chief Justice Fuller said:—

"But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit

such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals into them."

in denying an application.

The petition does not with any distinctness state the questions; but they may be briefly formulated as follows:—

(1.) Did the Circuit Court err in permitting the defendants to offer a certified copy of a deed dated January 30th, 1796, whereby the plaintiff's grantor's ancestor conveyed all his title to the lands in suit to the defendant's grantor.

(2.) Whether the instructions given by the court as to what is an entry upon lands under color of title were correct.

(3.) Whether the instructions given by the court as to adverse possession of lands as between tenants in common were correct.

These are questions relating to the title of lands in Virginia which are to be determined by a reference to the laws of that State, and are not of the general interest which justifies this application.

We would also submit that an examination of the record shows no exceptions or assignments of error in form complying either with the rules of this court or the Circuit Court of Appeals. The Circuit Court of Appeals, notwithstanding this deficiency, gave the cause patient hearing and a full determination, and we respectfully refer the court to the opinion of Judge Goff, filed in the cause, as showing that the questions involved are not open to serious controversy.

RICHARD C. DALE,
J. F. BULLITT,
R. A. AYERS,
For Defendants in Error.